(21,220.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE, MATIAS GIL, AND FELIX RAMOS, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF JAVIERRE & GIL, ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INCORPORATED.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 16, 1909.

1 In the District Court of the United States for Porto Rico.

At a stated term of the District Court of the United States for Porto Rico, within and for the district aforesaid, begun and held at the court-rooms of said court, in the city of San Juan, on the second Monday of October, being the fourteenth day of that month, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-second—present, the Hon. Bernard S. Rodey, Judge—among the proceedings had was the rendition of a final decree in the following case, to wit:

In Equity. No. 190. Mayaguez District.

CENTRAL ALTAGRACIA, INC., a Corporation Organized under and Existing by Authority of the Laws of the State of Maine and a Citizen Thereof,

vs.

CLEMENTE JAVIERRE, MATIAS GIL, and FELIX RAMOS, Loyal Subjects of the Kingdom of Spain, Co-partners, Doing Business under the Firm Name of Javierre and Gil, in the Municipality of Mayaguez, Porto Rico; EL BANCO TERRITORIAL Y AGRÍCOLA, a Corporation Organized under and Existing by Authority of the Laws of the Kingdom of Spain, Doing Business in the Island of Porto Rico, with Principal Office Located in the Municipality of San Juan, Porto Rico, and Subject of the Kingdom of Spain.

Be it remembered, that heretofore, to wit, on the twenty-first day of June, 1907, came the Complainant by its solicitors and filed its Bill of Complaint in this cause, which said Bill is as follows, to wit:

2 *Bill for Injunction.*

In Equity.

CENTRAL ALTAGRACIA, INC.,

vs.

CLEMENTE JAVIERRE ET AL.

To the Honorable the Judge of the District Court of the United States for the District of Porto Rico:

Central Altagracia, Inc., a corporation organized under and existing by authority of the laws of the State of Maine, and citizen thereof, doing business in the Island of Porto Rico, bring this its bill of complaint against Clemente Javierre, Matías Gil and Felix Ramos, all loyal subjects of the Kingdom of Spain, and copartners doing business under the firm name and style of Javierre and Gil, in the Municipality of Mayaguez, Porto Rico, and residents thereof,

and El Banco Territorial y Agrícola, a corporation organized under and existing by authority of the laws of the Kingdom of Spain, doing business in the Island of Porto Rico, with principal office located in the Municipality of San Juan, Porto Rico, and subject of the Kingdom of Spain, defendants.

II.

And thereupon your orator complains and says:

That during the year of Our Lord, One Thousand Nine Hundred and Five, Central Altagracia, Inc., was duly organized as a corporation under the laws of the State of Maine, for the purpose of manufacturing sugar from sugar cane in the Island of Porto Rico; that said corporation, in the Municipality of Mayaguez, Porto Rico, acquired control of and erected a large and costly factory at a
3 cost of more than Two Hundred Thousand Dollars, fitted same with valuable and powerful steam machinery, adapted to the purpose of manufacturing sugar from sugar cane, rapidly, in large quantities, with the latest and most improved process of manufacturing sugar from sugar cane, and at the same time your orator put said factory into operation, and is continuing to operate same.

III.

And your orator further states unto Your Honor that complainant owns no land of its own for the purpose of raising sugar cane from which to manufacture sugar, but is wholly dependent upon contracts with people owning or controlling land within the immediate vicinity of said mill or along the line of the American Railroad Company of Porto Rico, within a reasonable distance from your orator's mill.

IV.

And your orator further alleges unto your Honor that the capacity of your orator's mill is such that your orator needs, and must have, not less than the product of three thousand acres of land planted in sugar cane in order to furnish raw product to your orator's mill for the period of the usual grinding season, which usually begins about the fifteenth day of December and ends about the last of June.

V.

And your orator further alleges unto Your Honor that in order to be able to grind cane grown along the line of the American Railroad Company of Porto Rico, that your orator constructed and caused to be constructed a branch line of railway from the main line of the said American Railroad Company of Porto Rico a distance of over two kilometers, and constructed and erected a switch yard and large scale at the mill for the prompt and proper handling of cane coming to your orator's mill via the American Railroad Company of Porto Rico.

4 VI.

And your orator further alleges unto your Honor that the defendant copartnership of Javierre and Gil own or control two sugar

estates situate in the Municipality of Mayaguez, Porto Rico, and on or near the line of the American Railroad Company of Porto Rico, and near the station of Hormigueros and within a reasonable distance of your orator's mill, and that said sugar estates are named respectively "Estero" and "Florentina," and that they contain five hundred acres of land, more or less, and that about three hundred and fifty acres of said estates are planted in sugar cane, and that in an average crop year the yield of said estates is not less than twenty tons of marketable cane per acre, and that the whole of said estates is composed of land suitable for the purpose of growing sugar cane profitably.

VII.

And your orator further alleges that during the years of nineteen hundred and four, five and six, a certain promoter by the name of Swift, supposed to be representing an English or foreign syndicate proposed to erect a sugar factory upon the aforesaid property of defendants Javierre and Gil, and that during the latter part of the year of our Lord One Thousand Nine Hundred and Six, the said proposed central, which was in all the prospectuses of the said Swift called by the name of Central "Eureka," and was so designated in his correspondence with prospective colonos, etc., failed for the reason that the said Swift failed to make satisfactory arrangements with his prospective colonos, and failed to raise the necessary financial means to carry out his project.

VIII.

And your orator further alleges unto your Honor that during the first part of the month of December, on the year of our Lord One Thousand Nine Hundred and Six that defendant Clemente Javierre of the copartnership of Javierre and Gil represented to the officers of this corporation that he was still bound to the proposed "Eureka" scheme of said Swift, but that the thing had entirely failed, Swift was unable to raise the money, and that he was disposed to enter into a contract with the Central Altagracia for the grinding of the canes of the haciendas "Florentina" and "Estero," provided he could have a clause in their contract providing that if Mr. Swift did succeed in carrying out his proposed central scheme and erected a factory upon their property before the Nineteen Hundred Seven and Eight crop that he could be released from his contract with Central Altagracia Inc.

IX.

Your orator further alleges unto your Honor that in pursuance of the said representations of the defendants Javierre and Gil, through one of the copartners, to wit: Clemente Javierre, that the said Central Altagracia Inc. entered into a contract with said copartnership of Javierre and Gil to grind all the canes planted in the said haciendas "Florentina" and "Estero" for the term of five years with the right of the said Central Altagracia Inc. to extend said grinding contract for the further period of five years if the Central saw fit, all of which will more fully show by copy of said contract hereto an-

nexed, marked Exhibit "A," and made part of this, your orator's bill of complaint.

X.

Your orator further alleges that the usual price of cane in this District, under cane contracts with Central factories, is for each quintal or hundred weight of cane delivered on the cars of the American Railroad Company of Porto Rico Five pounds of sugar of 96° test, that under the contracts with centrals the cane must be ripe, free from straw, without suckers, and have at least thir-
6 teen per cent *such*-rose and not less than eighty purity, and for each one hundred pounds of sugar so credited to the party delivering cane, fifty cents on each One Hundred pounds of sugar shall be deducted for the purpose of paying the expense of sacking, shipping and selling in the New York market.

XI.

Your orator further alleges unto your Honor that on account of the long time contract, to wit: five years with the option on the part of said Central Altagracia to extend same for the period of another five years, and the positive assurance that Swift's proposed "Eureka" had been abandoned by Mr. Swift, that your orator instead of allowing said copartnership of Javierre and Gil the usual five pounds per hundred weight of cane less fifty cents per hundred weight of sugar, as herein before stated, the said Central Altagracia allowed the said copartnership of Javierre and Gil Five and One Half pounds of sugar per One Hundred pounds of cane, less twenty five cents per hundred pounds of sugar for expenses covering sacking, shipping and selling in the New York market all of which will more fully show by reference to aforesaid exhibit "A" of this bill of complaint.

XII.

Your orator further alleges unto your Honor that the crop of the said copartnership of Javierre and Gil for the season of Nineteen Hundred and Six and Seven was ground according to the terms and conditions of the contract entered into on the tenth day of December of the year of Our Lord One Thousand Nine Hundred and Six, and that the said copartnership of Javierre and Gil received as compensation for their cane Five and One Half pounds of sugar per One Hundred pounds of cane, less twenty five cents per One Hundred pounds of sugar. Your orator alleges unto Your Honor that the average crop of cane of the said partnership of Javierre and
7 Gil should not be less than Seven Thousand tons per year, and that your orator according to the terms and conditions of the aforesaid contract has the right to grind same for a further period of nine years, and that the average profit on a ton of cane to your orator is about one Dollar and Fifty Cents or about Ten Thousand Five Hundred Dollars per year, or during the life of the contract about Ninety Four Thousand Five Hundred Dollars. Your orator further alleges unto Your Honor that Mateo and Luis Fajardo are the owners of a mill that is now abandoned and called "San

José," situate near the station of Hormigueros, along the line of the American Railroad Company of Porto Rico, and that after the hereinbefore scheme of said Swift had wholly failed, and after the said Javierre and Gil had entered into the contract as aforesaid with Central Altagracia Inc., that the said Mateo Fajardo, Luis Fajardo, Tomas Cabassa and D. L. Thomson, in conspiracy and combination with the said copartnership of Javierre and Gil, organized and incorporated a company for the purpose of overhauling and reforming the said sugar mill belonging to the Fajardos and up to this time known as the "San José," and combining and conspiring together for the sole purpose of enabling the said copartnership of Javierre and Gil to have some pretended excuse for attempting to break their contract with Central Altagracia Inc., named the new corporation, which has taken over the said mill San José, "Central Eureka,"—but your orator solemnly alleges that said Central Eureka that is now in process of overhauling and being improved, has not, nor never had, any connection in any *am*nner whatsoever with the projected "Eureka" which is named in the contract with your orator and the said copartnership of Javierre and Gil, and that same is an entirely separate and distinct enterprise, and was named "Central Eureka" for the sole purpose of attempting to allow the said
8 copartnership of Javierre and Gil, to rescind their contract with Central Altagracia Inc. so that the said copartnership of Javierre and Gil could deliver their canes to the said proposed mill which is to be located on the hacienda "San José" of Mateo and Luis Fajardo, and not upon the lands of the said Javierre and Gil.

XIII.

Your orator further alleges unto Your Honor that the said Clemente Javierre of the said copartnership of Javierre and Gil informed the President, and Secretary and Treasurer of Central Altagracia, during the first days of June that he proposed to grind the canes of the copartnership of Javierre and Gil in the said "Central Eureka" which was to be located on the hacienda San José, and that they would not carry out their contract with Central Altagracia Incorporated, and that the said Central Altagracia would be notified of the breaking of said contract upon the first day of October, of the year of Our Lord, One Thousand Nine Hundred and Seven.

XIV.

Your orator further alleges unto your Honor that the said copartnership of Javierre and Gil, in conjunction with other members of the Eureka corporation are about to mortgage all or part of the said "Florentina" and "Estero" estates to the said defendant Banco Territorial y Agrícola for the purpose of raising funds to carry out the aforesaid scheme of enlarging and improving the mill located on the property of Mateo and Luis Fajardo.

Your orator further represents unto Your Honor that in the immediate neighborhood of the Central Altagracia there are now in course of erection two proposed central factories, to wit: the alleged Eureka scheme, to be located on the property of Luis and Mateo

Fajardo, and a sugar factory called Central Rochelaise, which
9 is located along the line of the American Railroad Company of Porto Rico, and between the said proposed mill on Fajardo's property and the Central Altagracia; and your orator further alleges that there is not sufficient cane not under contract to supply said two mills if put into operation and that the extent of land suitable for the raising of cane is limited, and that the contracts for grinding of cane have become very valuable, and that it will be impossible to replace them on account of the limited area suitable for the growing of cane, and that the loss of a cane contract of the size and importance of the Javierre and Gil contract is an irreparable injury to Central Altagracia Inc.

XV.

Your orator further represents unto Your Honor that the said defendant Banco Terrotorial y Agrícola is about to make the loan to said copartnership of Javierre and Gil, or to the individual members of same, in connection with the said Fajardos and Cabassa upon their properties or part of same jointly without a clause in said mortgage agreeing to respect and carry out all the conditions in the aforesaid contract between your orator and the said copartnership of Javierre and Gil, as required by section Fifteen of said contract, which heretofore has been attached and made part of this bill of complaint and marked Exhibit "A."

XVI.

Your orator further represents unto Your Honor that the value involved in this contract largely exceeds five thousand dollars exclusive of interests and costs.

XVII.

In consideration whereof, and for as much as your orator is remediless in the premises, by the strict rules of common law, and are only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

10 XVIII.

Your orator prays that a temporary injunction or restraining order, issuing out of and under the seal of this Honorable Court according to the form and the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendants Clemente Javierre, Matias Gil and Felix Ramos, copartners doing business under the firm name of Javierre and Gil, restraining them and each and every one of them, their agents and employees, from delivering any cane to the proposed Central Eureka to be located in the premises formerly belonging to Mateo and Luis Fajardo, which is grown on the haciendas "Florentina" and "Estero," and which are under contract to Central Altagracia Inc. during the terms of years that said contract has to be in force and effect; and that they and each of them, their agents and employees be further enjoined and restrained from selling, donating, renting

or mortgaging the said haciendas "Florentina" and "Estero," or either, or any part of either, to the said Banco Territorial y Agrícola, or any other person, persons, partnership, or corporation, without stipulating in the sale, contract or mortgage that the person renting, buying or mortgaging the said estates or part of them must carry out the contract with your orator, and that your orator may have such further or other relief in the premises as may be necessary and proper and as the nature of the circumstances of this case may require and to this Honorable Court shall seem meet, and at the final hearing of this case that the said temporary injunction may be made perpetual.

XIX.

And your orator further prays that a temporary writ of injunction or restraining order be issued out of and under the seal of this Honorable Court, according to the form of the statute in such case made and provided, directing, commanding, enjoining and
11 restraining the said defendant Banco Territorial y Agrícola, its officers, agents and employees, and each and every one of them from taking a mortgage on the estates "Florentina" and "Estero," or either of them, or part of either of them, without agreeing to carry out all the conditions of the contract entered into between the Central Altagracia Inc. and the copartnership of Javierre and Gil; and that your orator may have such other and further relief in the premises as the nature of the circumstances of the case may require, and to this Honorable Court shall seem meet; and upon the final hearing of this case, that the said temporary injunction may be made perpetual.

XX.

And may it please your Honor to grant unto your orator a subpoena issuing out of and under the seal of this Honorable Court directed to Javierre and Gil, and to Clemente Javierre, Matias Gil and Felix Ramos, copartners composing the firm of Javierre and Gil, and to the Banco Territorial y Agrícola, the defendants respectively, therein and thereby commanding them and each of them, on a certain day to be therein named, and under a certain penalty therein to be named, to be and appear before this Honorable Court, then and there to answer, but not under oath, answer under oath being hereby specially waived, all and singular the premises, and to stand to, perform and abide by the said order, direction and decrees as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Frederick L. Cornwell, makes oath according to law, and
12 deposes and says: That he is President of Central Altagracia Incorporated, the complainant in the foregoing bill of com-

plaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts are true, and as far as they relate to acts of others he believes them to be true. That in regard to all matters and things in the foregoing bill of complaint which are not within the personal knowledge of this deponent, the deponent has been fully informed and believes same are true.

F. L. CORNWELL.

Subscribed and sworn to before me this the twenty-first day of June, of the year of Our Lord, One Thousand Nine Hundred and Seven.

H. H. SCOVILLE, *Clerk*,
By RICARDO NADAL.

EXHIBIT "A."

(Filed June 21, 1907.)

The following Contract is on this day made and entered into by and between

The Central Altagracia, as party of the first part, and Javierre & Gil, as party of the second part, they wanting it to be as binding, and to have the same force as if executed before a Notary Public, and which will be executed in a public deed, as soon as either of said parties so demands it.

Terms and Conditions.

I.

The canes now growing on the finca (estate) of the party of the second part, situate in the Municipality of Mayaguez, known as "Florentina" and Estero," of Five Hundred Cuerdas, more
13 or less, shall be ground hereafter at the factory of the party of the first part under the term and conditions hereinafter stipulated and set forth. For the coming crop there will be 320 cuerdas of cane, of which 191 cuerdas shall be new cane, and the balance ratoons. For the crop of 1907 to 1908, there will be three hundred and twenty cuerdas of cane.

II.

The canes will not be cut until they are ripe and they will be delivered in the dayly quantities to be indicated beforehand by the Central, and they will be cut in pieces of not more than three feet, in good condition, free from straw, tops, seed and suckers, delivered on the cars of the American Railroad Company of Porto Rico, should the party of the second part have a switch (desvío) therefor; in any other case, they will be delivered at the Central's factory in carts.

III.

All expenses up to the delivery of the canes on cars at the station of Hormigueros shall be paid by the party of the second part, and all other expenses up to the conversion of said canes into ce-trifugal sugar, shall be of the account of, and paid by the party of the first part.

IV.

The canes will be weighed at the scales at the Central, by the factory, and the party of the second part may, either personally or through its representatives, witness the weighing as many times as they desire.

V.

The party of the first part is not bound to receive cane not completely ripe, and the party of the second part will not commence cutting until the party of the first part, after examining the canes, authorizes it.

14 VI.

Should the party of the second part, breaking the second and fifth stipulations of this contract, send to the Central any cane that is not in the conditions (of the quality) herein stipulated, the party of the first part will have the right, previously notifying the party of the second part thereof, to make the deduction in the weight it should deem advisable for the necessary protection of its interests.

VII.

The grinding season at the Central comprises the months of December to June, inclusive The delivery and grinding of canes may continue after June, should it be so convenient to both parties.

VIII.

The party of the second part will at the latest on the first of October furnish the party of the first part with a statement of the canes he expects to have ripe and ready for cutting in each one of the months of the crop, which statement is necessary for the party of the first part to arrange beforehand for the transportation and grinding.

IX.

For each 100 pounds of good cane, free from tops, seeds, and suckers received by the party of the first part the latter will pay the party of the second part the equivalent (importe) of Five and one half pounds of centrifugal sugar 96° test, in American Currency, the cash value of which will be the average obtained during the previous month for centrifugal sugar of 96° in the New York market, deducting one fourth of a cent per pound estimated for expenses and freight.

X.

The liquidations and delivery of the value (importe) which under the foregoing clause must be made by the party of the first
15 part, will be made within the first eight days of each month.

XI.

When for any accident or breaking of the machinery or on the railroads for transportation Central Altagracia were unable to continue the receiving of canes, the manager or whoever should substitute him will give timely notice to the party of the second part in order to stop the cutting of the canes, and, if within eight days the obstacle has not disappeared he may grind his cane already cut, in another factory, turning over the proceeds (importe) to Central Altagracia should he be indebted to this Central, and freely disposing of the proceeds in a contrary case. If at the expiration of fifteen days the Central were unable to keep on grinding, then the party of the second part may continue cutting his canes and grinding them wherever it should be convenient to him under and upon the conditions aforesaid, and until the Central Altagracia renews its grinding.

XII.

In case of fire in the canes during the grinding months the party of the second part will notify the Central Altagracia, and said canes will be ground the soonest possible, in preference to all others, provided they are in good condition therefor and the conditions or circumstances of the grinding allow it. The price of these canes will be the subject of an agreement by and between the parties.

XIII.

The party of the first will have the right to temporarily suspend at any time the cutting if the juice obtained from these canes at its mills should contain, under chemical analysis less than thirteen per cent (13%) suchrose or should prove to be less than 80 purity. It is further stipulated, however, that the canes already cut when the cutting is suspended, shall be received by the party of the
16 first part without any claim whatsoever.

XIV.

The duration of this contract will be—beginning with the coming crop of the year 190-, ending with the crop of the year 190-. Option is hereby granted to the Central Altagracia to continue or extend it for five years more, under the same terms and conditions, for which purpose it will give notice to the party of the second part six months before the expiration of the term above stated and stipulated.

XV.

The party of the second part, during the term of this contract, cannot sell, donate, rent or lease, nor mortgage his finca, nor create

or establish any incumbrance or charge on it, or its products, except upon the condition that this contract shall be respected in all its parts. The Central Altagracia may transfer or assign this contract in whole or in part, provided it is so transfered or assigned with the terms and conditions herein stipulated.

XVI.

If during the term of this contract the party of the first part should agree with the party of the second part to advance to the latter any sum for the refaction of the said canes, a special contract in a separate document must be made therefor.

XVII.

The party of the first part may have during the harvest season, at the loading station, a representative employee that he may see to it that canes not worth receiving are loaded.

In testimony whereof, both parties sign this document, in duplicate, in the presence of the witnesses Wm. Falbe and Carmelo Alemar, each party retaining a copy.

Mayaguez, the tenth day of December, 1906.

17 (Signed) CENTRAL ALTAGRACIA, INC.,
F. L. CORNWELL, *President.*

(Signed) JAVIERRE & GIL.
(Signed) WILLIAM FALBE.
(Signed) CARMELO ALEMAR, Jr.

The XIV clause is hereby modified as follows:

The duration of this contract will be five crops, beginning with that of 1906-1907, it being understood, however, that should the projected central "Eureka" be constructed or in course of construction on the 15th of January, 1908 (1908), the party of the second part will have the right to cancel this contract, giving notice thereof to the party of the first part on October 1st, 1907. *Addition.* The party of the first part binds itself to place at Hormigueros station sufficient cars, on each working day, in order that the party of the second part may load about one hundred tons of cane dayly, save cases of force majeur (fuerza mayor).

Date, ut retro.

(Signed) CENTRAL ALTAGRACIA, IN.,
F. L. CORNWELL, *President.*

(Signed) JAVIERRE & GIL.
(Signed) WM. FALBE.
(Signed) CARMELO ALEMAR, Jr.

United States of America,
District of Porto Rico, ss:

Leopoldo Feliu, being by me first duly sworn deposes and says:

That he is conversant in both the English and Spanish language, that he made the translation above, and that the same is true and correct to the best of his knowledge and ability.

L. FELIU.

18 Subscribed and sworn to before me this 21st day of June, A. D. 1907.

H. H. SCOVILLE, *Clerk*,
By RICARDO NADAL,
Deputy Clerk U. S. District Court for Porto Rico.

Motion for Temporary Injunction.

(Filed June 21st, 1907.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

In Equity. Bill for Injunction.

Now comes Central Altagracia, Incorporated, the above named Complainant, and moves the Court for a temporary injunction and restraining order against the above named defendants in accordance with the prayer of the bill filed herein. This motion is made upon the bill filed, and affidavits.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Solicitors for Complainant.

Notice of Motion for Temporary Injunction.

(Filed June 25, 1907.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

In Equity. Bill for Injunction.

Notice of Application.

To —— ——, the above named defendants:

You are hereby notified that the above named plaintiff will, on the 28th day of June, A. D. 1907, at the United States Court Rooms in the Municipality of San Juan, Porto Rico, at ten o'clock
19 A. M., or as soon thereafter as counsel can be heard, in accordance with the allegations of the bill of complaint, copy of which is herewith attached to this motion, *will* move the Court to grant to the Complainant a temporary injunction as prayed in said bill of complaint.

Mayaguez, P. R., June 21st, 1907.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Solicitors for Complainant.

Marshal's Return.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Writ on the therein-named Banco Territorial y Agrícola by handing to and leaving a true and correct copy thereof with Rafael Castro Gonzalez Director of said Banco Territorial y Agrícola, personally, at San Juan, in said District on the 24th day of June, A. D. 1907.

H. S. HUBBARD,
U. S. Marshal.
JOHN L. HAAS,
Deputy.

Marshal's Return.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Notice on the therein-named Clemente Javierre, Matias Gil and Felix Ramos by handing to and leaving a signed copy thereof, together with Attorney's copy of the Bill of Complaint referred to therein, with each of them personally near Hormigueros in said District on the 22nd day of June, A. D. 1907.

H. S. HUBBARD,
U. S. Marshal,
By RALEIGH F. HAYDON,
Deputy.

20 *Marshal's Return.*

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Notice on the therein-named Javierre & Gill by handing to and leaving a signed copy thereof, together with Attorney's copy of the Bill of Complaint referred to therein, with Clemente Javierre, a member of said firm personally near Hormigueros in said District on the 22nd day of June, A. D. 1907.

H. S. HUBBARD,
U. S. Marshal,
By RALEIGH F. HAYDON,
Deputy.

Subpœna.

(Issued June 21, 1907.)

No. 190. In Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Bill for Injunction.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

The President of the United States to Clemente Javierre, Matias Gil, and Felix Ramos, loyal subjects of the Kingdom of Spain, co-partners doing business under the firm name of Javierre y Gil, in Mayaguez, P. R., and the Banco Territorial y Agricola, a corporation organized under and existing by authority of the laws of Spain, doing business in Porto Rico, and subject of the Kingdom of Spain, Greeting:

You are hereby commanded that you be and appear in the said District Court of the United States for Porto Rico, aforesaid, at the court-room of said Court in the City of Mayaguez, P. R., on
21 the first Monday in August 1907, the same being the fifth day of that month, then and there to answer a certain Bill in Chancery exhibited against you in said Court by Central Altagracia, Inc., a corporation organized under and existing by authority of the laws of the State of Maine, and a citizen thereof and to do and receive what the said Court shall have considered in that behalf, and this you are not to omit under penalty of five thousand dollars ($5,000.00).

Witness, the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this 21st day of June, A. D. 1907; and in the 131st year of the Independence of the United States of America.

Attest:

[Seal of the U. S. Dist. Court for P. R.]

H. H. SCOVILLE, *Clerk,*
By RICARDO NADAL, *Deputy.*

Memorandum.

(Pursuant to Rule 12, Supreme Court U. S.)

You are hereby commanded to enter your appearance in the above entitled suit on or before the first Monday in August next, the same being the 5th day of said month, A. D., 1907, at the

Clerk's office of said Court, pursuant to said Bill; otherwise the said bill may be taken *pro confesso.*

H. H. SCOVILLE, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

Marshal's Return.

(Filed June 25, 1907.)

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed subpœna in Chancery on the therein-named Clemente Javierre, Matias Gil and Felix Ramos by handing to and leaving a true and correct copy thereof with each of them personally near Hormigueros in said District on the 22nd day of June, A. D. 1907.

H. S. HUBBARD, *U. S. Marshal,*
By RALEIGH F. HAYDON, *Deputy.*

Marshal's Return.

(Filed June 25, 1907.)

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Subpœna in Chancery on the therein-named Javierre & Gil by handing to and leaving a true and correct copy thereof with Clemente Javierre, a member of said firm, personally near Hormigueros, in said District on the 22nd day of June, A. D. 1907.

H. S. HUBBARD, *U. S. Marshal,*
By RALEIGH F. HAYDON, *Deputy.*

Marshal's Return.

(Filed June 25, 1907.)

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Writ on the therein-named Banco Territorial y Agrícola by handing to and leaving a true and correct copy thereof together with a copy of Bill and Motion for Injunction with Rafael Castro Gonzalez, Director of the Banco Territorial y Agrícola personally at San Juan, in said District on the 24th day of June, A. D. 1907.

H. S. HUBBARD, *U. S. Marshal.*
JOHN L. HAAS, *Deputy.*

23 *Notice of Application for Injunction.*

CENTRAL ALTAGRACIA, INC.,
vs.
JAVIERRE Y GIL ET AL.

Bill for Injunction, etc.

To Banco Territorial y Agrícola, one of the defendants in the above entitled suit:

You are hereby notified that the above named complainant will, on the 28th day of June, 1907, at the United States Court Room in the Municipality of San Juan, Porto Rico, at ten o'clock A. M., or as soon thereafter as counsel can be heard, in accordance with the allegations of the bill of complaint herein, which is now on file in said court, move the court to grant to the complainant a temporary injunction as prayed for in said bill of complaint.

San Juan, June 24, 1907.

F. L. CORNWELL,
N. B. K. PETTINGILL,
Solicitors for Complainant.

Order Book Entry.

June 24, 1907.

In Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
JAVIERRE Y GIL ET AL.

It appearing that the defendants have been notified that the complainant would call up a motion for an injunction in this cause on the 28th instant, now upon the filing of such notice the Court
24 orders that said hearing be continued.

Appearance for All Defendants.

(Filed July 12, 1907.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Comes now Charles Hartzell and Manuel Rodriguez Serra and enter their appearance in the above entitled cause as solicitors for the defendants named therein, and for each and all of said defendants.

Dated San Juan, Porto Rico, July 10th, 1907.

CHAS. HARTZELL.
M. RODRIGUEZ SERRA.

Order Book Entry.

August 27th, 1907.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Answer of Banco Territorial y Agrícola.

Now on this day comes Chas. Hartzell and Manuel Rodriguez Serra, solicitors of record for the Banco Territorial y Agrícola, and file its answer herein.

Answer of El Banco Territorial y Agrícola.

(Filed August 27, 1907.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

The answer of El Banco Territorial y Agrícola, one of the defendants above named, to complainant's bill of complaint in the above entitled matter:

This defendant respectfully now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering the same alleges and states:

That it denies that at the time of the filing of said bill of complaint or at any time the said defendants Javierre and Gil were negotiating with this defendant for any loan to be secured upon any of the property described in the bill of complaint, but admits that at about said time, there were certain negotiations between this defendant and the wives of said parties respecting a proposed loan, but this defendant alleges that since said time that all such negotiations have been abandoned and that no such loan was made or is now in contemplation.

And in conclusion this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged; without this there is any other matter, cause, or thing in said complainant's said bill of complaint contained material or necessary for this defendant to make answer to and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true in the knowledge of this defendant, all of which matters and things this defendant is ready and willing to

aver, maintain, and prove as this Honorable Court shall direct and it humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

CHAS. HARTZELL AND
M. RODRIGUEZ SERRA,
Solicitors for said Defendant.

26 *Order Book Entry.*

August 27, 1907.

No. 190. In Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Answer of the Other Defendants.

Now come Clemente Javierre, Matias Gil and Felix Ramos by Chas. Hartzell and Manuel Rodriguez Serra, their solicitors of record herein, and file their joint and several answer herein.

Answer of Javierre & Gil et al.

(Filed August 27, 1907.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

The joint and several answer of Clemente Javierre, Matias Gil, and Felix Ramos, three of the defendants above named, to complainant's bill of complaint in the above entitled matter.

These defendants respectfully now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering the same:

I.

For answer to the first paragraph of said bill of complaint these defendants admit the incorporation of the complainant company and admit the copartnership of these defendants as alleged therein as to a certain lease on the property known as Florentina, but they allege that the defendant Felix Ramos has no interest in the operation or ownership of the property known as Dos Hermanos and
27 which is erroneously called Estero in the said bill of complaint, and they also admit the organization of the defendant, the Banco Territorial, as therein alleged.

II.

For answer to the second paragraph of said bill of complaint, these defendants allege that, on information and belief, they admit the incorporation and purpose for such incorporation of the complainant company, and that the said complainant did acquire the control of a certain sugar manufacturing mill in the Municipality of Mayaguez, Porto Rico. That, upon information and belief, these defendants deny that the control of said sugar mill was so acquired at the cost of more than Two Hundred Thousand Dollars ($200,000), and they deny that the said mill has been erected or fitted with the latest or most improved process for manufacturing sugar or sugar cane. These defendants admits that the said complainant put said factory into operation in the year 1905, and has since operated the same.

III.

For answer to the third paragraph of complainant's bill of complaint, these defendants allege that they have no knowledge or information sufficient upon which to base a belief as to the matters and things alleged in the said third paragraph of said bill of complaint, and they therefore leave the same for the said complainant to make such proof thereof as it may be advised.

IV.

And for answer to the fourth paragraph of complainant's said bill of complaint, these defendants allege that they have no knowledge or information as to the capacity of the said sugar mill of defendants, or as to the amount of land necessary to be planted in sugar cane in order to furnish the said mill with business for the usual grinding season. That as to whether or not the said plaintiff company did cause to be constructed the branch line of railway from the main line of the American Railroad Company of Porto Rico, or as to the construction of switch yards and scales at said
28 mill for the purpose of handling the cane coming to said mill, these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief.

VI.

These defendants answering the sixth paragraph of the said complainant's bill of complaint, deny that the said copartnership of Javierre and Gil or any of the members thereof own any of the lands or estate described in said paragraph of said bill of complaint, but they admit that the said copartnership is in the control of the said two properties described in said paragraph of said complaint, one of which is held under a lease by said copartnership from the owners thereof, the same being the property known as Florentina and in which lease the defendant Felix Ramos is interested with said Javierre and Gil, and the other of which estates is the property of the wives of the said Javierre and Gil, and which is known as Dos Hermanos and not as Estero and that the said property is operated by the said Javierre and Gil by agreement with their said wives but

without any ownership therein or control over the same other than the permission and approval of their said wives and that the defendant Felix Ramos has no interest therein. They admit that on the said estate about 350 acres are planted in sugar cane and that the yield therefrom should be approximately as stated in said paragraph of said bill of complaint.

VII.

And for answer to the seventh paragraph of the said bill of complaint, these defendants allege that they admit that during the years 1904 and 1905 and during a part of 1906 a certain person named Swift was negotiating for the erection of a sugar factory on one of the properties controlled by these defendants or elsewhere in the vicinity and they admit that in the latter part of the year 1906 all negotiations of the said Swift and between the said Swift and the cane planters in said District with whom he was negotiating
29 including these defendants, failed and were definitely cancelled and abandoned. They admit that the said Swift wholly failed to make any satisfactory arrangements with the cane planters of said District with whom he was negotiating, and failed to raise the necessary financial means to carry out the said project; and these defendants allege that in the month of September, 1906, the said Swift having wholly failed as aforesaid in his negotiations aforesaid for the establishment of the proposed sugar mill to be erected by him, that all negotiations between the said sugar cane planters, including these defendants and the said Swift, were definitely abandoned and cancelled, and that from that time, to-wit, the said month of September, 1906, all attempted renewals of negotiations by the said Swift or anybody representing him in connection with the proposed construction of said sugar mill have been refused, and that since the month of September, 1906 and prior thereto they have been engaged in separately and independently negotiating with other parties for the construction of a sugar mill or central to be known as the Central Eureka, for the purpose of grinding the sugar canes to be raised in said vicinity by these defendants and neighboring sugar planters.

VIII.

And these defendants for answer to the eighth paragraph of the said complainant's bill of complaint, allege: that they deny that in the month of December, 1906, these defendants or either of them represented to the officers of the complainant corporation that he or they were still bound to the proposed Eureka scheme of the said Swift; but they admit that at said time they did represent and state to the said officers of said complainant company that the said scheme of the said Swift had entirely failed owing to the failure of the said Swift to raise the money necessary to carry out the same. These defendants deny that they or either of them at said or any time stated to the said officers of the said complainant company
30 that they or either of them was disposed to enter into a contract with the complainant company for the grinding of the

canes of the hacienda Florentina and Estero (dos Hermanos), provided he or they could have a clause in their contract providing that if Mr. Swift did succeed in carrying out his proposed central scheme and erected a factory on their property before the year 1908 crop, that he or they could be released from their contract with the said complainant company; that on the contrary these defendants allege the truth to be that at the time described in the said paragraph of the said bill of complaint and in connection with the negotiations of the contract with the complainant company hereinafter referred to, the defendant Javierre, who was the member of the said firm who negotiated said contract with said complainant company, expressly stated, as hereinbefore alleged, to the officers of the said complainant company that the said scheme of the said Swift had entirely failed, as alleged in said paragraph, but that these defendants were not willing to enter into any contract for the grinding of their sugar canes in the mill of the complainant company except upon the express condition which is set forth in the fourteenth clause, as amended, of said contract,—"That should the projected Central Eureka be constructed or in course of construction on the 15th day of January, 1908, that these defendants should have the right to cancel said contract, giving notice thereof to the said plaintiff company on October 1st, 1907." These defendants allege that in connection with the said clause in said contract the same had no relation whatsover to the said project of the said Swift, but that on the contrary the same related entirely to a project which had already been formulated between these defendants and others for the erection and construction by a company to be incorporated by these defendants and others, of a sugar mill or central, under the name of the Central Eureka, and that the said Central Eureka so referred to and which was intended by these defendants, and was fully understood by the said officers of the said complainant company, in
31 the said fourteenth paragraph of said contract, is now being constructed by the corporation which was formed by these defendants and others for the purpose of constructing the same, and which was in full process of negotiation at the time of the making of the said contract with the complainant company by these defendants on the 10th day of December, 1906.

IX.

And for answer to paragraph nine of the complainant's bill of complaint, these defendants admit that they did on the 10th day of December, 1906, by the defendant Javierre, enter into the contract set forth and marked Exhibit "A" to the said complainant's bill of complaint, but they deny that the said contract was entered into in pursuance of the alleged representations of these defendants, as set forth in the said bill of complaint; and they deny in connection with the said contract there was any right or agreement for the extension of the same in any way or manner.

X.

And for answer to paragraph ten of the said bill of complaint, these defendants deny that the usual price of cane in said district

is for each one hundred weight of cane delivered on the cars of the American Railroad Company of Porto Rico five pounds of sugar, 96 degrees test, and that for each one hundred pounds of sugar so credited to the party delivering cane that fifty cents on each one hundred pounds of sugar shall be deducted for the purpose of paying the expenses of sacking, shipping, and selling in the New York market; but they allege the truth to be that there is no usual price for sugar cane in said district under cane contracts with central factories, but that said prices vary in different cases depending upon conditions and circumstances; and they allege that different planters of cane receive different proces for the sugar cane delivered to said mills depending upon such contracts and upon the class and character of canes produced, and other circumstances connected therewith.

32

XI.

And for answer to the eleventh paragraph of said complainant's bill of complaint, these defendants deny that the price fixed in and by the contract set forth as Exhibit "A" to said complainant's bill of complaint was based on any consideration of the length of time of the said contract, or of any right to extend the same for any period on the part of the said complainant company; they deny that the said price fixed in said contract was so fixed in consideration of or had any relation whatever to any assurance that Swift's proposed Eureka had been abandoned by Mr. Swift, or that the same or the said price and the fixing thereof had any relation whatsoever to any question concerning the proposed erection of said Eureka mill by said Swift or by any other person; but they allege the truth to be that the said price fixed in and by the said contract was a usual, fair, and proper price for the sugar cane to be delivered under and by virtue of the terms of said contract, and was not a high or unusual price in said district to be paid under similar circumstances, and they allege that the said price was so fixed and agreed upon as a fair and reasonable price for said sugar canes to be delivered as aforesaid without reference to any consideration as to the time of said contract, or the building of any other sugar mill, or the failure to build the same, or of any outside consideration whatsoever other than the fair and reasonable value of said sugar canes so to be delivered.

XII.

And for answer to the twelfth paragraph of the said complainant's bill of complaint, these defendants allege that they admit that the said complainant company did grind the crop produced by these defendants of sugar cane for the season of 1906-7; but they deny that the same was so ground in accordance with the terms and conditions of the said contract, and on the contrary allege that the said complainant company failed in many respects during the furnishing of the said sugar cane in the grinding season of 1906-7

33 in carrying out and complying with the duties and obligations imposed upon the said complainant company by the

said contract. And particularly these defendants allege that the said complainant company, at different times during the grinding season of said crop, failed and neglected to furnish the number of cars required for the transportation of the sugar cane of these defendants, in accordance with the said contract, and that it failed to grind the sugar cane as fast as the same was delivered to the mill of the said complainant company, thereby causing serious loss, damage and injury to these defendants in and about the said crop. These defendants admit that the said crop of sugar cane so delivered to the complainant company by these defendants was paid for at the prices specified in said paragraph of said bill of complaint.

Further answering said paragraph of said bill of complaint, these defendants say that they admit that a normal crop of cane on the lands controlled by these defendants should not be less than seven thousand (7,000) tons per year; but they deny that the complainant, according to the terms of the contract referred to, or of any other contract or agreement, has any right to grind said cane for a further period of nine (9) years, or that it has any right to receive or grind the said cane for any further period whatsoever. That as to the average profit on a ton of sugar cane ground by the complainant company these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Further answering said paragraph of said bill of complaint these defendants admit that Mateo and Luis Fajardo were the owners of a mill situated near the station of Hormigueros in Porto Rico, and they admit that for some time prior to the present year the said mill was abandoned; but these defendants deny that after the scheme of the said Swift had wholly failed and after these defendants had entered into the contract, Exhibit "A" to complainant's bill of complaint, that these defendants in conspiracy or combination
34 with Mateo Fajardo, Luis Fajardo, Antonio Cabassa and D. L. Thomson, or with any other person or persons whomsoever, entered into any conspiracy of any kind or character, whatsoever, and they deny that they entered into any conspiracy or that in pursuance of any such conspiracy they organized or incorporated a company for the purpose of overhauling or reforming the said sugar mill belonging to the Fajardos, as hereinbefore set forth, or that they or any of them combined, or conspired for the purpose of enabling these defendants, as incorporators or otherwise, to have any excuse for attempting to break the said contract with the complainant company, and they deny that the said proposed new mill to be constructed by the new corporation referred to in said paragraph and which is now being overhauled and constructed under the name of the Central Eureka was so being constructed or is so being constructed for the purpose of attempting to allow these defendants to rescind their contract with the plaintiff company, in order that the canes of these defendants could be delivered to the said mill which is to be located on the property of the said Fajardos, as set forth in said paragraph of said bill of complaint. That on the contrary these defendants allege and state the truth to be that after the said

negotiations of these defendants and others with the said Swift had been wholly and definitely abandoned in the month of September, 1906, as hereinbefore alleged, and after the said Swift had been fully notified that all negotiations with him in connection with the said enterprise had been withdrawn and rescinded on account of his total failure to comply with his obligations in the premises, and in the month of October, 1906, and on the 20th day of said month, these defendants, represented by the defendant Javierre, together with Antonio Cabassa, Matco Fajardo, representing himself and his brother Luis Fajardo, and also in the interests of D. L. Thomson, met together at the property known as Dos Hermanos, being the property of the wives of defendants Javierre and Gil for the purpose of considering the project of the construction or mounting
35 of a new sugar cane mill or central, in view of the failure of the negotiations with the said Swift, and that at said meeting of said sugar planters, a preliminary project was prepared for the constructing, mounting and operation of a sugar mill and factory under the name of Central Eureka; and it was then and there agreed between said parties that a company should be organized consisting of the parties represented at said meeting and their associates; that said corporation should be known as the Central Eureka, and that the said company should take over, run, equip and mount the old factory then standing on the said property of the said Fajardos, which mill together with sufficient lands for the purposes of said company should be purchased from the said Fajardos, and that the parties to said preliminary agreement should bind themselves for the period of ten (10) years to furnish their sugar canes which they should raise to the said mill for grinding.

That a memorandum of the minutes of the said meeting of October 20, 1906, and the proceedings taken at said meeting was duly prepared, and copies thereof duly signed by all of the parties present were executed, the said parties each and all agreeing to be bound by the action then taken.

That in pursuance of the proceedings taken at said meeting the said parties proceeded at once to secure estimates from the makers of machinery and others who might be interested in the remodeling of the said factory and the installing of new machinery therein to make a complete central — and mill for the uses of said parties including these defendants; that in the month of November, 1906, estimates were duly furnished by the manufacturers of machinery, engineers and agents as to the cost of remodeling of said mill and the installing of the required machinery, and the said parties, including these defendants, entered actively upon the prosecution of the said projected construction and erection and remodeling of the said mill, and these defendants allege that at the time of the execution of the said contract of December 10, 1906, between these defendants
36 and the complainant company, that the said Central Eureka referred to in the said fourteenth clause of said contract as amended, was and is the mill which is now being erected in pursuance of the said proceedings of the said planters on the 20th day of October, 1906, and hereinbefore referred to, at which meeting these de-

fendants agreed to become promoters and in the incorporation of which they agreed to become and have since become largely interested as stockholders, and that from the time of the inception of the said project on the 20th day of October, 1906, at the said meeting, it was always agreed and understood that the said mill so to be reconstructed and remodeled should be known as the Central Eureka, and that the same was to be constructed by a corporation to be formed by these defendants and the other parties present and represented at said meeting of October 20, 1906.

That at the time of the execution of the said contract on December 10, 1906, with the complainant company it was fully known to and understood by not only these defendants but by the officers of the complainant company and by every one who had any interest in the said matter, that the said Swift project had wholly, definitely, and finally failed and been abandoned, and that there were no negotiations or obligations of any kind, and that there were no negotiations or obligations of any kind or character at said date pending either with these defendants or any other persons in said district and the said Swift for the construction of any mill under any name, and that on the contrary it was generally known in said district and on information and belief these defendants allege that the said officers of said complainant company knew of the new project, which had been formed as aforesaid by these defendants and their associates, for the incorporation of the company for the construction of the mill to be known as Central Eureka, and that the project at said time had proceeded so far that arrangements were being made and estimates were being prepared for the remodeling and reconstructing of the said old mill on the Fajardo property by these defendants and their associates under the said name of Central Eureka.

37 And these defendants allege that the said Central Eureka, which is now being constructed and remodeled by these defendants and their associates, was at the date of said contract the only enterprise under the name of Eureka which was under consideration in said district at said time, and was and is the identical project and the identical projected Central Eureka which was referred to by the said fourteenth clause of said contract as amended.

XIII.

And for answer to the thirteenth paragraph of the said bill of complaint, these defendants admit that since the commencement of the construction of the said Central Eureka by the said company promoted and controlled by these defendants and their associates, that they have stated that they proposed to grind the sugar cane produced by these defendants in the said Central Eureka which is located on the said Fajardo property, and that they would cancel the said contract with the complainant company of December 10, 1906, in accordance with the provisions of said paragraph fourteen*th* of said contract as amended. That these defendants have already served formal notice on the said complainant company of their intention to cancel the said contract of December 10, 1906, which notice they

expected to again serve on said company or its proper representative on the first day of October, 1906.

XIV.

And for answer to the fourteenth paragraph of the said bill of complaint, these defendants allege that at the time of the filing of the said bill of complaint herein there were certain negotiations pending between the wives of these defendants and the Banco Territorial y Agrícola, for the purpose of borrowing certain funds from said bank, but these defendants deny that they or either of them had any further interest in said negotiations than to act as the representatives of their said wives in and about said negotiations. They allege that they are not or either of them the owners of any of the lands
38 described in said bill of complaint, or have they the power or authority or right to mortgage any part or portion of the said estates or either of them for any purpose whatsoever, and they allege that the said negotiations with the said Bank have wholly failed and have been abandoned.

Upon information and belief these defendants admit that the two proposed central sugar factories, to-wit, the Eureka mill and another factory called the Central Rochelaise are being constructed along the line of the American Railroad Company in the said district. As to whether or not there is sufficient cane not under contract in said district to supply the said two mills if put into operation, these defendants have not and can not obtain sufficient knowledge or information upon which to base a belief. They deny that the area of land suitable for raising cane in said district is limited, and as to the effect of the loss of a cane contract of the size or importance of the contract of these defendants with the complainant company will be an irreparable injury to the complainant company, these defendants have not and can not obtain sufficient knowledge or information upon which to base a belief, but they allege that in connection with said contract of December 10, 1906, with the said complainant company they are simply acting in accordance with the terms and provisions thereof, as set forth in the fourteenth paragraph of said contract as amended, and are wholly within their rights in cancelling the said contract under the conditions and circumstances set forth in this answer.

XV.

And for answer to the fifteenth paragraph of said bill of complaint these defendants allege, that they deny the allegations therein contained and they demand proof thereof.

And in conclusion these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this there is any other matter, cause or thing in said complainant's said bill of complaint contained
39 material or necessary for these defendants to make answer to and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, in the knowledge of these defendants, all of which matters and things these defendants

are ready and willing to aver, maintain, and prove as this Honorable Court shall direct, and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CHAS. HARTZELL AND
M. RODRIGUEZ SERRA,
Chas. Hartzell and M. Rodriguez Serra,
Solicitors for said Defendants.

JAVIERRE Y GIL,
pp. CLEMENTE JAVIERRE.
CLEMENTE JAVIERRE.
MATIAS GIL.

His
FELIX RAMOS.
mark.
RICARDO NADAL: Witness.

Rule Taking Bill Pro Confesso.

(Filed October 7, 1907.)

CENTRAL ALTAGRACIA, INC.,
vs.
JAVIERRE & GIL ET AL.

Rule Taking Bill *Pro-confesso* as to Certain Respondents.

It appearing that the subpœna issued in this cause was duly and regularly served upon Javierre & Gil, one of the defendants herein, on the 22nd day of June, 1907, by delivering to and leaving with Clemente Javierre, a member of said firm, at the Municipal District of Mayaguez, in said District, an attested copy of said subpœna, and that said subpœna was duly and regularly served upon Clemente Javierre, Matias Gil and Felix Ramos, defendants herein, individually, on the said 22nd day of June, 1907, by delivering to and leaving with them, and each of them, at the Municipal Dis-
40 trict of Mayaguez, in said District, an attested copy thereof, and it appearing that said service was made on each of said defendants, Javierre & Gil, Clemente Javierre, Matias Gil and Felix Ramos, more than twenty days before the return day of said writ, and it further appearing that said defendants, and each of them have not filed any answer, or any other pleading whatsoever to the bill of complaint herein filed, although said answer or pleading was due, in accordance with the rules of this Court, upon the September Rule day; Now therefore, upon motion of N. B. K. Pettingill and F. L. Cornwell, solicitors for complainant, it is ordered that the bill of complaint in said cause be taken *pro confesso* as to said defendants named in accordance with the rules in such cases made and provided.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Solicitors for Complainant.

Journal Entry Mayaguez.

December 10, 1907.

190. Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Setting Aside "*Pro Confesso*" Herein.

And now comes Complainant herein N. B. K. Pettingill, Esq., one of the solicitors of record herein, and moves the Court for an order to proceed to a decree "*ex parte*," a rule taking the bill *pro confesso* appearing to have been entered on the Mayaguez Order Book of this Court on the seventh day of October, A. D. 1907, as against defendants Javierre and Gil, Clemente Javierre, Matias Gil and Felix Ramos; and Charles Hartzell, Esq., of counsel for defendants herein, in opposition to said motion prays the Court for an order setting aside the said *pro confesso* and granting leave to said named defendants to sign *nunc pro tunc* their joint answer herein filed on August 7, 1907, and the Court upon due consideration grants defend-
41 ants leave so to sign their said answer *nunc pro tunc* and orders said *pro confesso* now set aside at defendant's costs.

Whereupon the Court proceeds with the hearing of this cause on bill and answer, and testimony on behalf of complainant herein commences.

Journal Entry Mayaguez.

December 11, 1907.

190. Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Testimony on behalf of complainant continues.

And now come defendants Javierre & Gil by Clemente Javierre an active partner of said firm, Clemente Javierre, Matias Gil, and Felix Ramos, and by leave of the Court as per order of the 10th instant heretofore entered, sign *nunc pro tunc* their joint answer heretofore filed herein.

Journal Entry Mayaguez.

December 12, 1907.

190. Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Hearing resumed. Testimony on behalf of complainant completed. Testimony on behalf of defendants commences.

Journal Entry Mayaguez.

December 13, 1907.

190. Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Hearing resumed. Defendants' testimony completed. Com-
42 plainant's testimony in rebuttal given.

Journal Entry Mayaguez.

December 14, 1907.

190. Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Statu quo to be Preserved.

N. B. K. Pettingill, Esq., and Charles Hartzell, Esq., of counsel respectively for complainant and defendants herein, proceed now with their closing arguments before the Court, on the termination of which the Court announces that a Decree will be given within ten days and both sides agreeing thereto, the Court orders that the *statu quo* of the matters in dispute is meanwhile to remain unaltered, no canes to be ground by the defendants anywheres pending the decision of the Court herein.

Journal Entry San Juan.

January 7, 1908.

In Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE Y GIL ET AL.

The Court hands down an opinion deciding the issues in this cause in favor of the complainant, and directs that a decree be prepared in accordance therewith.

Opinion.

(Filed January 7, 1908.)

43 In the District Court of the United States for Porto Rico, Mayaguez.

CENTRAL ALTAGRACIA, INCORPORATED, Complainant,
vs.
JAVIERRE & GIL ET AL., Respondents.

Bill for Injunction.

Statement and Opinion on Merits.

The complainant is a corporation organized under the laws of the State of Maine. Its sugar factory or plant is located some six miles north of Mayaguez in the Island of Porto Rico. The plant has a spur of railroad connecting it with the main line of the American Railroad Company. It is located on a small patch of ground, and is a custom mill for grinding cane,—owning practically no land of its own, but depending upon surrounding cane planters in the vicinity and up and down the railroad for its supply and support. The grinding capacity of the mill is about three hundred tons of cane per day in season. The value of the mill at the time of the making of the contract in question was about two hundred thousand dollars, but additions to the extent of sixty or seventy thousand dollars have been made since.

It will be sufficient for the purposes of this statement to say of the respondents that they are partners in the cane raising business and are subjects of the King of Spain. Their land where the cane in controversy in this suit is raised, is located about the same
44 or a somewhat greater distance south, that complainant's plant is north, of the city of Mayaguez, in the San German valley. It will not be necessary to consider the other respondent,

the Banco Territorial y Agricola, as it has disclaimed any interest in the proceeding.

The bill was filed June 21, 1907. A temporary restraining order was issued under it, with an order to show cause returnable at a short day, but as no injury could occur until the grinding season of the crop of 1907-8, which would not begin until at least the middle of January of the latter year, and as the Court was then about to take its summer vacation, counsel on both sides agreed that the restraining order should remain in force and matters be in abeyance until a final hearing should be had at some convenient time in the fall of 1907. The answer was filed August 27, 1907. On Tuesday, December 10th, the court opened at Mayaguez, and a full hearing was had on the merits in the cause, which lasted continuously during four days thereafter, or until noon on Saturday, December 14th following. During this time nearly forty witnesses,—counting recalls—were heard, a large number of exhibits and a considerable amount of correspondence were introduced, and the case was fully and ably argued by counsel on the respective sides.

For several days previous to those expressions of our views, we have caused the stenographer to read his notes of the evidence almost completely, and parts of them several times, and have again read the exhibits and correspondence with unusual care, and have also examined the law applicable to such a case at some length. This last labor has been the greater, as counsel have not filed any written briefs before us.

The cause turns essentially on a question of fact, and one
45 of such an unusual character as to be extremely embarrassing to the Court, and which embarrassment is increased by a most unusual and annoying amount of direct conflict and contradiction in the evidence presented.

Complainant alleges in substance that respondents Javierre & Gil are operating and growing sugar cane on two plantations located as stated, known as "Florentina" and "Estero." That the area of both combined is about five hundred acres. That about three hundred and fifty acres thereof are planted in cane at the present time. That for some time, in fact several years, previous to the month of December, 1906, an Englishman named Swift had been in and around Mayaguez and the San German valley aforesaid, promoting the erection of a sugar central to be financed by English or American capitalists, the same to be known as the central "Eureka," and that the respondents Javierre & Gil, with others to be hereafter mentioned, had been working with him and in conjunction with him and others, also to be hereafter mentioned, and were endeavoring to have the said central become an assured fact. That on the 10th day of said month, the respondent firm, through their Mr. Clemente Javierre, entered into an ordinary printed contract such as is usual between sugar factories and cane growers, with this complainant, by which they agreed for a stipulated price, which complainant alleges was and is unusually large but which latter fact respondents deny, for the grinding of the cane to be grown upon said two properties under conditions in the contract set out, for five crops beginning with that of 1906-07, the latter being then ready for grinding, and

which first crop was immediately and in due time thereafter completely ground at complainant's mill and in part performance of the contract. But complainant further alleges that at the time
46 of the making of said contract, the said Javierre contended that he was still bound to the proposed "Eureka" project of said Swift, and which might yet be built, and for that reason insisted upon an exception or reservation to the term of five years in the contract aforesaid.

In the printed (Spanish) contract which they entered into, and which is in evidence, clause XIV thereof is the one wherein the term of the contract would ordinarily be filled in This clause in both the original and duplicate introduced in evidence appears to be crossed out, and the following typewritten clause, the first paragraph of which only, is really material, was endorsed on each of the same above the signatures, apparently in lieu of the clause erased, that is to say:

"La clausula XIV queda modificada como sigue: La duracion del presente contrato sera de cinco cosechos comenzando con el de 1906-7; entendiendose sinembargo que si para el dia 15 de enero de 1908 estuviere montada o montandose la proyectada Central "Eureka" la segunda parte tendra el derecho de cancelar el presente contrato dando aviso a la primera parte el lro de Octubre de 1907.

Adicion:—La primera parte se compromete a poner en la estacion de Hormigueros suficientes vagones cada dia laborable, para que la segunda parte pueda cargar alrededor de cien toneladas de caña diaramente, salvo los casos de fuerza mayor."

A reasonably fair translation of the first clause aforesaid is about as follows:

"Clause XIV will stand modified as follows: The duration of the present contract will be for five crops commencing with that of 1906-7, it being understood nevertheless, that if by January 15, 1908, the projected central "Eureka" shall be mounted or in course of being mounted, the party of the second part shall have the right to cancel the present contract, giving notice to the party of the first part on the first of October, 1907."

That notwithstanding the making of this contract and the fact that the contemplated or projected "Eureka Central" was not mounted, or in course of being mounted, respondents had secretly conspired with others and rehabilitated with new and second hand sugar machinery an old muscavado sugar plant and building
47 situated on the property of one Mateo Fajardo and had organized a corporation calling the same "Eureka," to conduct the said rehabilitated plant, and were claiming that the same was in fact the "Eureka" mentioned in the contract aforesaid, and were asserting that they would deliver the cane in controversy here to the same, and were refusing to consider themselves bound to complainant, but insisting that they were not, and that they would not continue to deliver cane to complainant's mill, but would give the stipulated notice and would end the relations of the parties.

Ordinarily this would be a bill for the specific performance of contract, yet the relief sought for is peculiar. Counsel for complainant no doubt realized that cases are rare where a mandatory

injunction will be issued by a court against respondent, when compliance with it involves the performance of personal labor or services, for the reason that in most of such cases there is an adequate remedy at law, and because the compliance with such a mandate might trench upon the law's abhorrence of slavery. Hence counsel has taken a course for which there seems to be ample precedent, that is, the negative side of the proposition. In other words, he prays that the respondents be enjoined from delivering any of the cane grown upon the two plantations in question, which they are under contract to deliver to complainant's mill, to any other mill during the term for which they are so bound. 3 Parsons on Contracts, 8th Ed., p. 321,n. Opera singer case; Metropolitan Ex. Co. *v.* Ewing, 42 Fed. Rep. 198. Counsel for both sides appear to acquiesce in this view of the law, and have apparently submitted their rights to the Court with that idea; at least the trial proceeded with that tacit understanding.

48 It may be well to note that it is pretty well settled in law that equity will not ordinarily force a specific performance of a contract that relates only to chattels, because usually when the contract does not refer to realty there is an adequate remedy at law. However, this rule is not without exceptions, and in all cases where greater injury may occur to complainant by the breaking of a contract than could be recovered under the rule governing the measure of damages at law, equity will grant relief. In this case, if complainant should sue at law, the measure of damages would be the value of the cane, or the profit on it that complainant would make by grinding it, and no account could be taken of the probably greater injury to the entire plant by reason of being deprived of a sufficient quantity of cane to keep a mill of that capacity going. See Parsons on Contracts, 8th Ed., foot pages 305, 317-18, and notes. See also Willard *v.* Tayloe, 8 Wall. 557.

The answer admits the execution of this contract for the grinding of the five crops of cane as above set out. It also admits the truth of several paragraphs of the bill that it is unnecessary at this place to refer to, avoids other paragraphs and in substance sets up about the following state of facts:

That for several years previous to December 10, 1906, different persons, including respondents, had been endeavoring to bring about or promote the erection of a sugar central in the San German valley where the property in question is located, the said central to be called "Eureka." That the most recent principal promoter of said enterprise was an Englishman by the name of Swift, but that he had entirely failed to secure the necessary funds to erect the plant, and that therefore the planters in that vicinity, including respondents, had

49 agreed among themselves to raise the money and erect it on their own account, and that this agreement had taken place nearly two months before the making of the contract with complainant, and that the latter's officers knew this to be the fact. That this intention of the planters of that vicinity to erect this sugar central was the reason for the insertion of this limiting clause in the principal contract. That the planters did thereafter in fact get to-

gether, raise the money, and have, as matter of fact, now erected said "Eureka" sugar central; and that because of this respondents claim and have in law a perfect right to give notice to complainant as provided for in the said reservation clause, and to have the said contract cease and determine, and to hereafter deliver their cane to this new sugar factory which they insist is in fact the "Eureka" central referred to.

No replication was filed, but the parties treated the situation as though there had been, and went to trial on the issue thus raised. The proofs varied very considerably from the pleadings, but as the principal question to be determined is the sole question as to the meaning of the reservation in the contract, the case was argued as if in fact the pleadings had been amended to conform to the proofs. A lot of immaterial testimony crept into the case, but we have avoided any evil effect of it in our review of the whole case.

During the trial the Court made an inquiry from the bench as to where the burden of proof lay, or as to which of the parties under such state of facts had in law the laboring oar. The matter was not then definitely settled but it was announced that as great latitude had been given both sides to introduce all proofs which could in any way throw light upon the issue, we would take the question of the burden of proof into consideration when passing upon the rights of the parties on the proofs as finally submitted.

50 We have since examined the question and are of opinion that, under a contract like this, which was complete and absolute between the parties, the execution of which they both admit and which, unless interrupted by the occurring of an event mentioned in the contract itself, is to continue for five years, the burden of proving the fact that such contingency has arisen is upon him who alleges it, and that therefore, without departing from the general rule that the burden is always upon the plaintiff to make his case, the burden here is upon the respondents to show that the "Eureka" to which they now claim the right to deliver their cane is the same "Eureka" contemplated in the clause of the contract referred to. This they claim they have fully done, but passing that for the moment, it seems to us that this proposition is analogous to one which often arises in the mining States in cases commonly known as apex-side-line issues. In such proceedings, the plaintiff having perfect title to the surface ground of his mining claim, shows that fact on the trial. The defendant in ejectment admits all this, and shows that he also has perfect title to an adjoining claim within the boundaries of which is the apex of a lode or vein of ore, which, as he follows it in its course downward, departs from the perpendicular into and beneath plaintiff's claim, and that under the law he has a right to thus follow his vein and mine his ore. It is pretty well settled that the defendant has the affirmative of such an issue. See Bell *v.* Skillicorn, 6 N. Mex. 399; Greenleaf *v.* Birth, 6 Pet. 302; Bagnee *v.* Broderick, 13 Pet. 436. A very interesting exposition of this question is set out in the opinion of Judge Phillips of the Circuit Court of Colorado in Cheesman *v.* Hart, 42 Fed. Rep. 105.

The actual proofs in this case were about as follows:

51 An elderly gentleman, evidently of some considerable dignity and prominence in that section, by the name of Antonio Ramon Cabassa y Tasara, who has been for many years,—and perhaps all his life—a resident of this San German valley, testified at some length and from his evidence and that of others it appeared that he has been endeavoring to secure the erection of a sugar central there for several years last past, perhaps even as far back as the beginning of American occupation in 1898. That his insistance as to the project and his claim from time to time that he had or was about to secure capital to accomplish the desired result, caused him to name the project "Eureka;" in other words, that he had found it or succeeded. There was some evidence that his many failures in accomplishing his desire caused his efforts to be regarded in the community as somewhat of a joke, and certainly this was so during the last two or three years. However, whether any real important effort was made in that regard in the early days or not is not so certain, but it is unquestionable that some time in the summer of the year 1905, this Mr. Cabassa, in company with a capitalist named A. L. Arpin, went around among the cane growers and secured contracts for the grinding of cane in a proposed central from some of the planters, the area of which amounted in all to an aggregate of several thousand acres. All of these contracts which were taken in Cabassa's name were shortly thereafter assigned to this Mr. Arpin, and the latter in turn some time in the summer of 1906 assigned all of them to this Englishman, Mr. A. E. H. Swift, who had a short time previous come upon the scene to promote a central. Arpin then stepped out of the equation, and Swift and Cabassa with a sugar machinery engineer named D. L. Thompson, began to agitate the matter. Swift was the person who undertook to
52 raise the money, while Cabassa was, or considered himself a sort of a spokesman for the planters. It appears that Mr. Thompson did not do much save to wait around with a view of seeing if the project became a reality, so that he might be employed as its engineer and probably invest some of his means in it. Swift made several trips to New York and London and dealt or pretended to deal or negotiate with capitalists, probably in both places, but did not seem to be able to definitely secure the money soon enough to suit the planters. Early in September, 1906, Cabassa and the people in the San German valley apparently became much dissatisfied with him and exasperated at his delay, and Cabassa sent a cablegram from Mayaguez to London requiring that he get some local financiers on the Island or the Bank of England to put up some £50,000 security as evidence of his good faith. By this time many or most of his contracts with the cane grower- thus assigned to Swift by Arpin were expiring or had already expired. So, on October 20, 1906, a meeting of Cabassa and several of the planters, including the respondent Clemente Javierre, was had at the house of Cabassa with a view to considering the matter of the central. By this time Mr. Cabassa, it appears, had become pretty well disgusted with Mr. Swift, and the following day he with Javierre sent Swift a cablegram attempting to break off all negotiations. Swift or his

friends replied to at least the first of these cablegrams and tried to have matters suspended until Swift could return from England.

One of the principal planters of this San German valley is a certain Mr. Mateo Fajardo, a gentleman of evident education and prominence, who with his brother Luis is the owner of a very considerable estate there, but at least Mateo's cane lands are under lease to the Guanica Central, a gigantic sugar making plant
53 situated a considerable distance off to the southeast, but connected by railroad with the San German country. This man Mateo Fajardo, as near as the Court can gather from the evidence, not only objected to outside capital erecting any central in that vicinity, but also desired to profit personally by having any central that should be built, located upon his own estate in some old buildings that came to him from his father's estate, which were used in the manufacture of muscavado sugar years ago, but which have been idle for many years. This Mr. Fajardo was at the meeting held on October 20, 1906, and it appears from the evidence that he was not only one of the principal spokesmen, but was quite active against Mr. Swift and probably was largely instrumental in causing the second cablegram to be sent to Swift the following day. At the time of this meeting, Mr. Gil, the other respondent, was in Spain, and only Clemente Javierre was present representing the firm. Mr. Thompson, who was in the country at the time, was not present, and, according to his evidence, never saw or knew of the written agreement said to have been made then, until about the time of the incorporation in April, 1907. It is claimed that at this meeting an agreement in writing was entered into between the two Fajardoes, Mr. Cabassa and the respondents Javierre & Gil, and was signed by them and each took a copy, but that it was signed by Clemente Javierre in his own name, pending the return of his partner Gil from Spain. Counsel for complainant insists that this agreement, a copy of which was introduced in evidence, is false, and that it never was in fact made there at that time, but was manufactured for the purposes of this case, and they contend that all the facts in the case show the reasonableness of this contention, and that evidence of such fact would probably appear in certain letters
54 from respondent Clemente Javierre to his partner Gil in Spain and in a letter of his to one Wilson here in Porto Rico, if they were produced, which complainant could not procure, but which ought to be in the power of respondents, which they deny and made a showing to account for the loss of the letters referred to.

Complainant also introduced evidence to show that in the latter part of October, 1906, respondent Clemente Javierre went with this Mr. Mateo Fajardo to the Guanica Central, and there tried to make a contract to grind his cane for one year, but he wanted to get five and a half per cent. sugar with a twenty-five cent freight reduction, but that the Guanica people would not pay this price, which they considered too high, unless the contract was made with them for a five year term. Evidence was also presented, intended to show that after the cablegram trying to break off negotiations with Swift, was sent on October 21, 1906, Javierre entered into negotiations with, or

received offers from people promoting another central in that vicinity known as "La Rochellais", and it also appears that Cabassa and the people in the valley tried to negotiate with one W. S. Marr and a practicing attorney here named Dexter with a view to having both or one of them promote a central in that vicinity, but that nothing came of this latter effort although thirty days' time was given them to consider the matter.

It appears further that immediately after the meeting of October 20th, Mr. Fajardo proceeded to make inquiries as to where he could raise money to help build a central or to put old machinery or machinery that was partly old and partly new into the buildings on this estate of his which was called "San Jose", and it is certain
55 that he wrote to bankers and others and accosted several people with that end in view, besides requesting a man who was going to Cuba to make inquiries there as to second hand or other machinery that might be bought. It is also in evidence that this Mr. Thompson, at the request of Cabassa, Fajardo and others, shortly afterwards proceeded to make estimates as to the cost of the renovating of these old "San Jose" buildings or plant and the mounting of second hand and new machinery therein, and that he made several trips and considerable inquiry in that regard. It also appears in evidence that along in 1905 and 1906, while Javierre was first connected with Cabassa and Arpin and later with Swift, he had his cane ground at the central "Coloso" north of Mayaguez, and that because of some mishap to the machinery of that concern, quite a portion of his crop was ground with the permission of "Coloso" and at the request of Javierre himself at the mill of complainant, "Altagracia", which had then recently been renovated considerably. Complainant claims that this grinding was done at that time for respondents under the promise that they would later make a long time contract with complainant for the grinding of their cane. It further appears that in the summer and fall of 1906, Mr. Cornwell, the manager of "Altagracia", was quite anxious to secure this long time contract to grind respondents' cane and sent for Javierre several times in mid-summer and during that fall with a view to getting him to sign such a contract, but was put off first on the ground that it was too early to make a contract and that he would sign it all right in the fall when Cornwell came back from the States, where he was then about to start for, and for Cornwell not to worry about it, and later on one excuse or other up to December 10th, when it was signed. Mr. Cornwell was absent in the States until some time in the early fall of that year,
56 and after his return to the Island had to go back almost immediately to the States owing to some financial interests he had in connection with what is known as the Ceballos failure, and that he did not return to the Island until the first days of December, 1906. During his absence his bookkeeper, William Falbe, tried to get Javierre to sign the contract, but without success. After Mr. Cornwell's return he kept sending for Mr. Javierre with a view to getting this contract signed, and finally on December 10th Javierre came to his office and signed it. This Mr. Falbe, who was then working as bookkeeper for the complainant, filled out the contract and wrote out,

first with a pencil and afterwards with a typewriter, this limitation clause which was endorsed on both copies of the contract as stated, and about the meaning of which this whole controversy has arisen. Evidence as to what took place at the time of the actual signing of this contract is meagre and very unsatisfactory indeed. On the one hand, Mr. Cornwell and his clerk, Mr. Alemar, state that the exception or reservation was put in that contract wholly with reference to the Swift project, because, as Mr. Cornwell says, Mr. Javierre was,—as he says himself—still bound to Swift by a contract which he had outstanding, although it was believed that Swift would not succeed in getting money to build any central, and that therefore the contract would in fact last for five years, and that Cornwell for that reason considered that he was safe in accepting the contract, as he knew it would last for the full term, even if he was anxious to get it, and so he paid five and a half pounds of sugar per hundred pounds of cane, with only a twenty-five cent freight reduction, instead of the five pound payment and the fifty cents reduction which was, as he contends, customary, and further was warranted in putting from
57 sixty to seventy thousand dollars' worth of improvements in his mill, which was done; that if Javierre kept silent when he ought to have spoken, he should be estopped now. Mr. Falbe, the bookkeeper who wrote this additional clause to the contract, but who has since started an opposition mill of his own, states that the only thing he can recollect as having been said when Javierre and Cornwell came into the room where he was, although they had a conversation in the outer room some time before, was that Javierre insisted that in addition to the word "montado", the word "montandose" should be added so that it would read that he should have the right to end the contract if on January 15, 1908, the projected "Eureka" was either in fact then mounted or being mounted.

Mr. Cornwell is, in addition to being president of complainant's sugar company, also a practicing lawyer at Mayaguez, and states that he knew all about the efforts of Cabassa and Arpin to promote a central in the San German valley two or three years back, as the papers were made in his office, but that he never heard of this claim that "Eureka" was an old story in that valley, until this bill was filed. That he never heard of the name "Eureka" until about the time Arpin was leaving and Swift came upon the scene, and that Swift's project was known by the whole community for about a year previous as "Eureka." That Javierre made no mention in any conversation whatsoever to him of any efforts of the local planters to build a central or of their having entered into any arrangement to that end save with Swift, or that they intended to do so, and he testified,—and in this he is corroborated by several witnesses—that the fact that such a central as this one by the local planters was going to be built was not known in the community until just before the incorporation of the concern in the latter part of April or the first of May,
58 1907, and that he had his ear to the ground for such news and would have heard it if it was at all known.

On the other hand, Mr. Javierre testifies that he met Mr. Cornwell one night on the street in Mayaguez and told him about the fact that

Swift had entirely failed to build the plant and that the planters themselves were going to build it, and that he talked of this often to Mr. Cornwell, and that he thought Mr. Cornwell must have been tired of hearing it. All this Mr. Cornwell emphatically denies. Mr. Mateo Fajardo also asserts that he told Mr. Cornwell of their intention to build this central themselves, and so does his brother Luis Fajardo. Mr. Cornwell denies each and every one of these statements in toto and gives his reasons for saying that the parties must be mistaken. On the witness stand, the Fajardo brothers and Mr. Cabassa were rather emphatic and positive in their statements and seemed to be deeply interested in the controversy. We might state at this place in the expression of these views, that the controversy here is strictly between the complainant, the Central Altagracia, and the respondents, Javierre & Gil and their other partner Mr. Felix Ramos, and that the desires or interests of Mr. Fajardo or Mr. Cabassa, however laudable or intense, can cut absolutely no figure in the strict legal rights of the parties, and that their testimony can have no weight in the case save as it may throw light upon the controversy itself between the real parties in interest.

It was fully proved that Fajardo, Cabassa, Javierre, Thompson and others did in fact on May 4, 1907, organize a corporation which they called "Eureka" central, and that respondents Javierre & Gil each took fifteen thousand dollars worth of the capital stock thereof, and at least made a contract with it, whether simulated or not,
59 to deliver their cane from the land in controversy to it to be ground for a period of ten years beginning with 1908. Of course it can be said in answer to this that all of these things which they did after the signing of the contract with complainant and after the issuance of the restraining order herein should not be permitted to affect complainant's rights, if in truth it is entitled to have the cane in controversy ground at its mill for four additional years.

Complainant of course claims that this central so erected is nothing but the remodelling of an old mill by Mr. Fajardo and his friends, and that he has induced Javierre & Gil to join the concern, and has, by calling this new Fajardo project "Eureka," made them believe that they can break their contract with complainant, and that he, Fajardo, in fact has dominated Mr. Cabassa and the Javierres into this belief, and complainant contends that this is inequitable and that it should not be permitted, because they intimate that they were induced to spend a large amount of money improving their mill by the belief that Swift would not succeed and that he was the only person whose action could break this contract; and further, that if in fact this agreement between the local planters was entered into on October 20, 1906, or one and two-thirds months before Javierre & Gil made the contract with complainant, because Mr. Javierre remained silent and did not notify complainant of the intention of these parties to build the "Eureka," that therefore respondents Javierre & Gil are estopped in law from now damaging complainant by taking away this large amount of cane from its supply, which they show is a large portion of their whole available supply, and that to be deprived of it will in fact not only deprive them

of their profit on the grinding, which they calculate is $1.50 a ton or thereabouts, but will ruin their plant by leaving it without
60 sufficient cane to come up to its capacity, and no other supply is available at this time. Complainant also shows by introducing a large amount of correspondence between this man Swift and the house of Moral & Company of Mayaguez, and in other ways,—the introduction of none of which was objected to but in fact was consented to—that Swift did not give up his project when they cabled him on October 21, 1906, but that he in fact came here afterwards and went out to the vicinity in question and that Mr. Cabassa called a meeting of the planters for his benefit, at which Mr. Fajardo and others attended. Mr. Cabassa states he did this just to please Swift, but knew at the time Swift could not succeed. The evidence shows that this meeting amounted to nothing as the planters by that time had become thoroughly disgusted with Swift, that Mr. Cabassa and Mr. Fajardo talked so much against him that nothing could be done towards renewing cane contracts which he wanted for his "Eureka" enterprise. Mr. Javierre was not at this meeting and states that he absented himself because he had in the previous October given up the contract he had with Swift to him, and told him that he would have nothing more to do with him,—that Swift asked him for the contract. Mr. Cornwell denies with feeling that Javierre gave up this contract to Swift, and insists that he not only did not do so, but that Javierre's contract with Swift was in full force when the principal contract was entered into December 10, 1906, and that its existence and binding force between the parties was the sole reason for the putting in of any limitation as to a time shorter than five crops.

After a careful examination of the evidence, we are of opinion that the respondent, Mr. Javierre, if in fact he signed the
61 agreement of October 20th, did not consider himself bound by it, and Mr. Fajardo and Mr. Cabassa did not know for many months thereafter whether they could succeed in erecting any central. This is manifest because Mr. Cabassa testified that Mr. Javierre took little or no part in the efforts to organize this new central until late in the spring of 1907, when he saw that it was going to be a success, and it is further made manifest from the evidence which shows that Mr. Fajardo had to do a good deal of work of importuning of Mr. Javierre to keep him from making deals with other proposed or talked of new centrals. It is in evidence that the Guanica people had talked of going into the San German valley and erecting a central, and of course the cane of this valley is more or less subject to this new Rochellais Central that is being erected by Wilson, Falbe and others. Mr. Javierre himself seems to appreciate that Mr. Fajardo is largely responsible for this controversy, because Javierre while on the stand testified with some asperity that it was Mr. Fajardo who got him into the condition he is now in. Mr. Thompson kept up his dealings with Swift and others up to the very eve of the incorporation of this new so-called Eureka or San José Central. This is made manifest by his own evidence and by a copy of a letter which he wrote from Mayaguez to Mr. Swift in San Juan,

P. R., as late as April 24, 1907, and the copy of the letter also shows for what it is worth that the Javierres were trying to do business with Wilson and the Guanica people after the date they claim to have concluded to build this new central.

The letter from Thompson to Swift is as follows:

"Box 382, Mayaguez, *April 24th*, 7.

Mr. A. E. H. Swift, c/o Mr. R. A. Macfie, San Juan.

62 Dear Mr. Swift: On Thursday morning last before leaving with train for Mayaguez I wrote you a pencil note and left it at Macfie's office advising you that Wilson meant business. From what young Wilson, whom I met in the train the following day, told me. I have no doubt that you received that note safely. Young Wilson and Mr. Falbe were full of the project and stated that they had everything arranged including the credit at the Colonial Bank and the machinery arranged for by cable with Mirrless Watson of Glasgow. I wired to Fajardo who met me at the train and he told me the whole thing was a humbug and that the Javierres would not do anything with Wilson. I did not know what to think as they were also negotiating with Guanica but the whole matter was settled yesterday when a company was formed and it was decided to put old machinery in Fajardo's buildings, the principle stockholders being the Fajardos, Javierres, Gil, Cabasa and myself. I simply had to go in to save myself falling between yourself and Wilson.

Yours very truly,

(Signed) D. L. THOMSON.

Mr. Swift, who was still in San Juan, Porto Rico, (almost the 1st of May, 1907) and still endeavoring to build this very central, the one he had been promoting for a couple of years, sent a press copy of this letter of Mr. Thompson to Moral & Co., at Mayaguez and through them it was introduced in evidence by complainant, together with a letter from Mr. Swift, dated April 26, 1907, to Moral & Co., wherein it is plainly set out that he, Swift, still hoped to build his Eureka Central, and does not regard Fajardo and Cabassa and the Javierres as having any right to appropriate either the name "Eureka" or the project. Mark this sentence which occurs in it: "Will Javierres' participation in Fajardo's factory affect Eureka being put up on their estate, or, must we look for another mill site?"

The whole letter is as follows, and it throws a world of light on this controversy:

"San Juan, Porto Rico, *26th April*, 1907.

Messrs. Moral & Co. S. en C., Mayaguez, P. R.

63 Dear Sirs: I wrote you a letter yesterday, and this morning have received a letter from Mr. Thomson of which I enclose you a press copy, telling us of the formation of a Company to put old machinery in Fajardo's Buildings.

Messrs. Javierre & Gil it appears are shareholders. They have a contract with Altagracia Central by which they are bound to have their cane ground at Altagracia for five years if work for the Eureka Factory is not begun by October of this year. Will Javierres' participation in Fajardo's factory affect Eureka being put up on their estate, or, must we look for another mill site?

It would appear to me that Fajardo's factory being small, will not affect the necessity which exists for a larger factory to save the district being gobbled up by Guanica.

Please give me your ideas as to the plan to be pursued now we know of the establishment of Fajardo's factory, until I receive which I will not write to my friends.

I remain,

Yours truly,

(Signed) ARTHUR E. H. SWIFT."

Now suppose the Guanica people had in fact come into the valley and erected a central, or suppose the Wilson Falbe people had joined with Cabassa and Fajardo and erected one and called it "Eureka," on the evidence here could it be claimed that such fact would give the Javierres the right to break this contract? Let us suppose that after October 1, 1907, the date when the Javierres under the limitation clause could give notice to complainant of their intention to break the contract, that Swift had actually gone on and built his Eureka Central, as he was liable to have done, for he was still working on it in May, 1907, after this new concern had been incorporated, would not Mr. Javierre, under all the evidence here, have the right to claim that Swift was the party whose work had given him the absolute right to break his contract with Altagracia? Remember that from the best evidence in the case, "Eureka" was to be built on Javierre's own property. If Swift had built and a controversy had taken place between him and Fajardo as to the right to use the name "Eureka," who would have won?

64 As stated at the outset, we have been and still are much embarrassed in this cause because of the serious conflict in the evidence, and the intense feeling apparent in the matter, as well as because of the large amount of money involved. We are confronted with a peculiar situation. On the one hand a man should have absolute freedom to deal with his own property as he sees fit, while on the other hand he should so use his own as not to injure others. The ending of this contract means heavy damage to Altagracia, yet if respondents' contention is right, the Court cannot prevent it, even though to hold the contract in force for the five crops insures to respondents a good price for their cane. In our examination of the text writers and authorities with reference to suits to enforce specific performance of contracts, we were impressed with the unanimity with which it is held that a chancellor has great discretion in this sort of a case, and while of course he is bound to follow the law, he can and often does because of changed conditions modify the strict terms of agreements so as to do equity between the parties. Yet it appears to be impossible to do that in this case

because no facts warrant it. The contract must either be sustained for its full term or be broken under its own terms. There is no room for any half way course.

It was suggested during the trial and argument by counsel that because this is a mere application for an injunction, the decision could not be considered such a finality as would entitle either side to take an appeal from the decision of the Court in the premises. We are unable to take this view of it, because we are of opinion that all the rights of the parties are submitted in this issue, and that
65 the Court's decision is such a finality as that the losing side can take an appeal to the Supreme Court of the United States from our action, and we so hold.

While we have stated several times in this opinion that there is great conflict in the evidence, we do not wish to be understood as necessarily charging any of the parties or witnesses with having wilfully sworn falsely. We have practiced law a sufficient number of years and have seen enough of the world to know that the best of men will understand things differently, and in their enthusiasm for their own side of an issue will unintentionally give prominence and color to their own desires, so that only a neutral mind can properly discount and weight the statements made.

As stated, we feel that the burden is on the respondents as to the real issue in the case, and we find that they have not by a preponderance of the evidence established their right to have given this notice to complainant on October 1, 1907, and to end the contract. Therefore we hold that they are bound to supply their cane to complainant's mill for the full term of the five crops, but as the prayer of the bill is for negative relief, our order will be that the temporary restraining order be made permanent so as to enjoin respondents for the full term of the five crops of cane set out in the complaint and contract, or so long within such term as complainant is able, willing and ready to receive, grind and pay for the same, from delivering any of such cane to the San José or so-called Eureka mill described in the answer, and it is so ordered. A proper order or decree will be prepared to carry out this intent and decision of the Court.

B. S. RODEY, *Judge.*

66 *Journal Entry San Juan.*

January 11, 1908.

In Equity.

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE Y GIL ET AL.

Final Decree.

This cause coming on to be heard, upon the application of the complainant for a final decree in accordance with the prayer of the

bill and the findings and conclusions of the opinion of the Court herein, rendered on the 7th of January, instant, this Court hereby finds upon consideration of the pleadings and evidence herein that the equity of the cause is with the complainant and that it is entitled to the relief in its said bill prayed.

It is therefore hereby Ordered, Adjudged and Decreed that the defendants, Clemente Javierre, Matias Gil, and Felix Ramos, as copartners under the firm name of Javierre & Gil and as individuals, their agents and employees, be and they hereby are restrained and enjoined from delivering any sugar cane grown on the haciendas "Florentina" and "Estero" to the Central Eureka located in the premises formerly belonging to Mateo and Luis Fajardo, for the full term of five crops beginning with the crop of the year 1906-7, or so long within such term as complainant is able, willing and ready to receive, grind and pay for the same; and that said defendants be and they hereby are, further enjoined from selling, donating, renting or mortgaging said haciendas above named, or any part of either of them, to any person or corporation without stipulating in such sale, contract, or mortgage that the person so renting, buying or receiving such mortgage shall carry out the contract with complainant described in its bill of complaint herein; and that complainant recover from defendants its costs in this behalf, for which execution
67 may issue.

Petition for Appeal.

(Filed January 11, 1908.)

THE CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE, MATIAS GIL, and FELIX RAMOS, as Copartners as Javierre and Gil, and THE BANCO TERRITORIAL Y AGRICOLA.

The above named defendants conceiving themselves to be aggrieved by the order and decree made and entered in the above entitled case on the 11th day of January 1908.

Wherein and whereby it was ordered adjudged and decreed that said defendants should be enjoined and restrained from selling and delivering to the Central Eureka any of the sugar cane growing or to be grown on the premises described in the bill of complaint, and restraining the said defendants from leasing selling or encumbering said premises save subject to complainant's rights during a certain contract set forth in said bill of complaint, do hereby appeal from the said order and decree of January 11th, 1908, to the Supreme Court of the United States, and pray that this appeal may be allowed, and that a transcript of the record papers and proceedings upon which said order and decree was made duly authenticated may be sent to the Supreme Court of the United States.

Said defendants further pray that the Court shall fix and determine the amount of the bond to be filed by said defendants upon said appeal and to direct that upon the filing and approval of said bond, that the same shall act as a supersedeas bond and that the

operation of said injunction awarded in and by said decree may be suspended pending the determination of said appeal.

CHAS. HARTZELL,
M. RODRIGUEZ SERRA,
Solicitors for Defendants.

68 *Order Allowing Appeal.*

(Filed January 11, 1908.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

On motion of Chas. Hartzell and M. Rodriguez Serra, Solicitors and of Counsel for defendants, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein, be and the same hereby is allowed, and that a certified transcript of the record testimony, exhibits, stipulations, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of twenty five thousand dollars the same to act as supersedeas bond, and also as a bond for costs and damages on appeal. and it is further ordered that upon the filing and approval of said bond that the operation of the injunction awarded in and by the said final decree shall be suspended pending the determination of said appeal.

B. S. RODEY, *Judge.*

Dated January 11, 1908.

69 *Bond on Appeal.*

(Filed February 6, 1908.)

THE CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Know all men by these presents that we Javierre and Gil, a copartnership composed of Clemente Javierre, Matías Gil, and Felix Ramos as principals and Mateo Fajardo and Luis A. Fajardo and Manuela Santos and Carmen Santos and Clemente Javierre and Matias Gil as sureties are held and firmly bound unto The Central Altagracia Incorporated, in the full and just sum of Twenty-five thousand ($25,000) Dollars to be paid to the said The Central Altagracia Incorporated its attorneys, successors or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 1st day of February, A. D. 1908.

Whereas lately at a session of the District Court of the United States for the District of Porto Rico, in a suit pending in said Court wherein the said The Central Altagracia Incorporated was complainant and the said copartnership of Javierre and Gil, and the said The Banco Territorial Agrícola were defendants, a decree was rendered against the said defendant copartnership Javierre and Gil, and the said copartnership Javierre and Gil having prayed for and obtained from said Court an order allowing said appeal, to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and directing that upon the filing and approval of the bond therein provided for, that the operation of the injunction awarded in
70 and by the said decree should be suspended pending the determination of said appeal.

And a citation directed to the said The Central Altagracia Incorporated is about to be issued citing and admonishing the said The Central Altagracia Incorporated to be and appear at the Supreme Court of the United States at Washington.

Now the condition of the above obligation is such that if the said copartnership of Javierre and Gil, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and virtue.

JAVIERRE Y GIL, [SEAL.]
By CLEMENTE JAVIERRE.
MANUELA SANTOS. [SEAL.]
CARMEN SANTOS. [SEAL.]
MATEO FAJARDO. [SEAL.]
LUIS A. FAJARDO. [SEAL.]
CLEMENTE JAVIERRE. [SEAL.]
MATIAS GIL. [SEAL.]

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

On this 1st day of February, 1908, personally appeared before me Mateo Fajardo one of the sureties named in, and who executed the foregoing bond, and who being first duly sworn by me, deposes and says that he is a resident and householder of Porto Rico, that he is possessed of real estate in Porto Rico, over and above his just debts and liabilities and subject by law to execution of the fair value of Sixty Thousand Dollars.

MATEO FAJARDO.

Subscribed and sworn to before me this 1st day of February, 1908.

JOHN L. GAY, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

[Seal of U. S. Distr. Court for Porto Rico.]

71 UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

On this 1st day of February, 1908, personally appeared before me Luis A. Fajardo, one of the sureties named in, and who executed the foregoing bond, and who being first duly sworn by me, deposes and says that he is a resident and householder of Porto Rico, that he is possessed of real estate in Porto Rico, over and above his just debts and liabilities and subject by law to execution of the fair value of Twenty Thousand Dollars.

LUIS A. FAJARDO.

Subscribed and sworn to before me this 1st day of Feb. 1908.
JOHN L. GAY, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

On this 1st day of February, 1908, personally appeared before me Manuela Santos one of the sureties named in, and who executed the foregoing bond, and who being first duly sworn by me, deposes and says that she is a resident and householder of Porto Rico, that she is possessed of real estate in Porto Rico, over and above her just debts and liabilities and subject by law to execution, of the fair value of Twenty-Five Thousand Dollars.

MANUELA SANTOS.

Subscribed and sworn to before me this 1st day of February, 1908.
JOHN L. GAY, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

On this 1st day of February, 1908, personally appeared before me Carmen Santos one of the sureties named in, and who executed the foregoing bond, and who being first duly sworn by me, de-
72 poses and says that she is a resident and householder of Porto Rico, that she is possessed of real estate in Porto Rico, over and above her just debts and liabilities and subject by law to execution, of the fair value of Twenty-Five Thousand Dollars.

CARMEN SANTOS.

Subscribed and sworn to before me this 1st day of February, 1908.
JOHN L. GAY, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

On this 5th day of February, 1908, personally appeared before me Clemente Javierre, one of the sureties named in, and who exe-

cuted the foregoing bond, and who being first duly sworn by me, deposes and says that he is a resident and householder of Porto Rico, that he is possessed of real estate in Porto Rico, over and above his just debts and liabilities and subject by law to execution, of the fair value of Three Thousand Dollars, and further that he consents to his wife Carmen Santos becoming a surety on the bond as aforesaid.

CLEMENTE JAVIERRE.

Subscribed and sworn to before me this 5th day of February, 1908.

JOHN L. GAY, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

On this 5th day of February, 1908, personally appeared before me Matias Gil, one of the sureties named in, and who executed the foregoing bond, and who being first duly sworn by me, deposes and says that he is a resident of Porto Rico, that he is possessed of real estate in Porto Rico, over and above his just debts and liabilities and subject by law to execution of the fair value of Twenty-Five Hundred Dollars and further that he consents to his wife, Manuela Santos, becoming a surety on the bond as aforesaid.

73 MATIAS GIL.

Subscribed and sworn to before me this 5th day of February, 1908.

JOHN L. GAY, *Clerk,*
By RICARDO NADAL,
Deputy Clerk.

Sufficiency of sureties on the foregoing bond approved this 6th day of February, A. D. 1908, and the same accepted as sufficient in form and substance.

B. S. RODEY, *Judge.*

Motion for Extension of Time to File Transcript.

(Filed February 21, 1908.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

Comes now the above named defendants copartnership as Javierre & Gil, by its solicitors Messrs. Hartzell & Rodriguez, and thereupon they represent and show to the Court that in connection with the appeal which has been prayed in said cause, it is necessary in the preparation of the record to cause to be extended the stenographic notes of the testimony taken on the trial, etc., and that owing to the engagements and duties of the official stenographer of this Honorable

Court, it has been impossible for said stenographer to prepare the said transcript of the said testimony, and your petitioners say that it will be impossible to secure the same within the time limited by law and by the citation issued and served in this cause, on the appeal thereof, for preparation and filing in the Supreme Court of the United States,

Wherefore your petitioners ask this Honorable Court by a proper order to be duly entered in that behalf, to order that an extension of time be granted to your petitioners for the preparation and
74 filing in the Supreme Court of Washington, of the record and transcript to be filed on appeal in the Supreme Court of the United States in this cause, such extension to be for the period of sixty days from the date when the said transcript and record should be filed in accordance with the allowance of the appeal and the citation issued and served herein.

HARTZELL & RODRIGUEZ SERRA,
Solicitors for said Petitioners.

Order Allowing Extension of Time to File Transcript.

(Filed February 21, 1908.)

CENTRAL ALTAGRACIA, INC.,
vs.
JAVIERRE & GIL ET AL.

Come now the respondents Javierre & Gil, herein by their solicitors Hartzell & Rodriguez Serra and file a petition setting forth reasons why it is impossible to prepare the transcript on appeal to the Supreme Court of the United States, within the time allowed by law and pray that the same be extended, and the Court having read said petition and heard said counsel in that behalf and being fully advised grants said petition and it is,

Therefore ordered and adjudged that on the filing of said petition the time for the preparation and filing of the record and transcript on appeal in said cause to the Supreme Court of the United States, be and the same hereby is extended for the period of sixty days from the date when said record and transcript should have been filed in said Supreme Court under the order allowing the appeal.

Assignment of Errors.

(Filed February 25, 1908.)

CENTRAL ALTAGRACIA, INC.,
vs.
CLEMENTE JAVIERRE ET AL.

75 Comes now the above named respondent the copartnership Javierre & Gil, by Hartzell and Rodriguez Serra, its solicitors and it files the following assignment of errors upon which the said

copartnership will rely in the prosecution of its appeal from the decree made by this Honorable Court on the 9th day of January, 1908, in the above entitled cause:

I.

That the said Court erred in rendering and entering a decree in favor of the said complainant the Central Altagracia and against this respondent copartnership Javierre & Gil, that the contract between the said complainant and this respondent by which sugar canes were to be furnished to the said complainant by this respondent for the period of five years, was in force and effect, and in granting an injunction against this respondent restraining and enjoining it from selling or delivering sugar canes produced by this respondent to the Central Eureka, as is ordered and directed in and by said decree.

II.

The said Court erred in deciding and determining and decreeing that any injunction should issue in the premises against this respondent and in favor of the said complainant, but that on the contrary the only relief to which complainant could have been entitled by virtue of the facts alleged in the bill of complaint, would have been a decree for the specific performance of the contract alleged in the bill of complaint herein.

III.

The said Court erred in holding, determining and adjudging that on the 10th day of December, 1906, when the contract in controversy was entered into between the said complainant and this respondent, that this respondent was under any obligation or
76 had any contractual relations existing with the so-called scheme or enterprise known as the Swift Eureka Central.

IV.

The said Court erred in holding and adjudging that the proposed Central Eureka mentioned in the said contract of December 10, 1906, and in the fourteenth clause thereof, as amended, referred to the so-called enterprise which was known as the Swift Eureka, and erred in failing to determine and decide that the said proposed Central Eureka mentioned in the said clause of the said contract did not refer to the Central Eureka which was initiated by the contract of this respondent and others for the construction of the Central Eureka, which was initiated at a meeting on the 21st day of October, 1906, and which Central Eureka has since been constructed and equipped.

V.

The said Court erred in determining and adjudging that Clemente Javierre at the time of the execution of the said contract on December 10, 1906—on behalf of this respondent copartnership with the said complainant, understood or intended to refer to the so-called

enterprise which was known as the Swift Eureka Central in clause 14th thereof, and the Court erred in failing to adjudge and determine that the said Clemente Javierre, in the execution of the said contract intended to refer to, and did by the said exception mentioned in the 14th clause of the said contract actually mean and refer to the said Eureka Central which was initiated at the meeting on October 21, 1906, between the said Javierre and others and which Eureka Central has since been fully constructed and equipped.

VI.

The said Court erred in holding and determining that the respondent Javierre if he signed the agreement of October 20th, (21st, 1906) did not consider himself bound by the same.

77

VII.

The Court erred in holding and deciding that the burden of proof in the said cause was shifted from the complainant to the respondent either by virtue of the pleadings or the evidence in said cause.

VIII.

The Court erred in holding and determining that the burden of proof was on the respondents as to the real issue in said cause.

IX.

The said Court erred in determining that respondent had not by a preponderance of the evidence established its right to give notice to complainant on October 1st, 1907, to terminate the contract in controversy.

X.

The said Court erred in determining that the respondents were required to establish their defense to the Court by a preponderance of the testimony.

XI.

The Court erred in issuing any injunction in the premises under the pleadings and evidence in the cause, it being manifest from the pleadings and evidence that the only relief which the Court could grant in the premises should be in the nature of a decree for a specific performance.

XII.

The said Court erred in failing to prepare and file specific findings of fact in the premises.

XIII.

The said Court erred in rendering and entering a decree in favor of the said complainant and against this respondent and ordering and decreeing the issuance of an injunction in the premises.

XIV.

The said Court erred in failing to render and enter a de-
78 cree in said cause in favor of the said respondent dismissing the said bill of complaint for want of equity.

XV.

The Court erred in granting any relief to complainant under the pleadings and evidence in the case, the contract in controversy being unilateral and incapable of enforcement in law or equity.

XVI.

The Court erred in failing to dismiss the said bill of complaint on account of the unilateral character of the contract sued on.

XVII.

And for other and manifest error of the Court, appearing upon the face of the pleadings and proceedings herein.

Wherefore the said respondent copartnership Javierre and Gil appellant prays that the judgment and decree of said Court may be reversed and set aside.

JAVIERRE AND GIL,
Respondent and Appellant,
By HARTZELL AND RODRIGUEZ SERRA,
Its Solicitors.

Præcipe for Transcript of Record.

(Filed February 17, 1908.)

CENTRAL ALTAGRACIA, INC.,
vs.
JAVIERRE AND GILL ET AL.

The Clerk will please prepare for filing on appeal in the above entitled cause, a transcript containing:

Subpœna and return.
All pleadings and motions.
All orders of Court.
79 Judgment and decree.
Opinion of the Court.
All motions and orders relating to appeal.
Citation and return.
Appeal Bond.
Assignment of Errors.
Copy of this Præcipe.

HARTZELL & RODRIGUEZ SERRA,
Solicitors for Defendants.

80 District Court of the United States for Porto Rico.

No. 190. In Equity. Mayaguez Division.

CENTRAL ALTAGRACIA, INC.,
vs.
JAVIERRE & GIL ET AL.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing seventy-nine typewritten pages, numbered from 1 to 79 inclusive, to be a full, true and correct copy of the record and proceedings of the above and therein entitled cause requested in the præcipe of complainants, copy of which is included in this transcript, as the same remain of record and on file in the Office of the Clerk of said Court.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States for Porto Rico, at San Juan, P. R., this 3d day of June, A. D. 1908.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk of the District Court of the United States for Porto Rico.

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Central Altagracia, Inc., a corporation organized under and existing by authority of the laws of the State of Maine, and a citizen thereof, and N. B. K. Pettingill and F. L. Cornwell, its Solicitors of Record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within sixty days from the date of this writ, pursuant to an order allowing an appeal duly entered and of record in the Office of the Clerk of the District Court of the United States for Porto Rico, in that certain cause in equity in the Mayaguez Division of that court, numbered 190, wherein Clemente Javierre, Matias Gil and Felix Ramos, copartners doing business under the firm name of Javierre and Gil, and El Banco Territorial y Agrícola, a corporation organized under and existing by the authority of the laws of the Kingdom of Spain, are defendants and appellants and you are complainant and appellee, to show cause, if any there be, why the decree rendered therein against said defendants and appellants, as in the said order allowing said appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, and the seal of said court, at San Juan, Porto Rico, this 25" day of January, A. D. 1908, and

of the Independence of the United States of America the One Hundred and Thirty-second.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY, *Judge.*

Attest:
JOHN L. GAY, *Clerk.*

Service of the above citation and receipt of a copy thereof admitted, this 25th day of January, 1908.

N. B. K. PETTINGILL,
One of Solicitors for Complainant and Appellee.

[Endorsed:] No. 190 Mayaguez. Citation. Filed Clerk's office, United States District Court. January 25, 1908. John L. Gay, Clerk of the Court, by A. M. Bacon, Deputy.

82 In the District Court of the United States for the District of Porto Rico.

CENTRAL ALTAGRACIA, INCORPORATED, Complainant and Appellee,
versus
JAVIERRE & GIL ET AL., Defendants and Appellants.

Statement of Facts in the Nature of a Special Verdict.

Appeal to the Supreme Court of the United States.

In accordance with the provisions of the Act of Congress of the United States of April 7, 1874, relating to appeals from territorial courts to the Supreme Court of the United States, the following statement of facts in the nature of a special verdict has been prepared in lieu of the evidence at large offered upon the trial of said cause:

I.

That the complainant company is a corporation organized under the laws of the State of Maine, having a sugar factory or plant located about six miles north of the City of Mayaguez, in the Island of Porto Rico; that the Company had in the year 1905 acquired the control of a sugar factory at said point, to which large and costly additions and improvements were made; that the said mill of complainant
83 has a spur of railroad connecting it with the main line of the American Railroad Company; that the same is a custom mill for grinding cane of planters in the vicinity and having practically no land of its own it is dependent upon sugar-cane planters in that immediate vicinity and the line of railroad for its supply and support; that the grinding capacity of said mill is about three hundred (300) tons of cane per day in the sugar season, and that the value of the said mill at the time of the execution of the contract which forms the basis of this controversy was about, Two Hundred Thous-

and Dollars ($200,000.00), but that additions to the extent or value of some Sixty or Seventy Thousand Dollars have been added thereto.

II.

That the respondent and appellant is an agricultural copartnership operating under the firm name and style of Javierre & Gil, the said copartnership consisting of three (3) partners, to-wit, Clementi Javierre, Matias Gil, and Felix Ramos. That the said copartnership is not the owner of any lands, so far as the evidence in said cause discloses, but that the said copartnership has been for several years last past and was at the time of the happening of the matters in controversy in this action, engaged in the cultivation and raising of sugar cane on two (2) separate properties, the same being situated and lying about six (6) miles south or southeast of the City of Mayaguez in what is known as the San Germán Valley and adjacent to the line of railway of the American Railroad Company.

That of the said two properties so cultivated by the said respondent copartnership, one of them known as the property "Florentina,"
was and is held and operated by said copartnership, by virtue
84 of a certain lease from the owner thereof, and that the other
of said properties known as "Dos Hermanos" and called in the bill of complaint "Estero," was and is the joint property of the wives of the Copartners Javierrre & Gil. But no evidence was produced before the Court showing what arrangement, if any, existed between the said wives as the owners of said property and the said Copartnership for the operation and cultivation thereof; but it was shown that the same was being so operated by the said copartnership with the apparent acquiescence and under some satisfactory arrangement with the said owners thereof. That the said two properties contained approximately five hundred (500) acres of land, and that of the same approximately three hundred and fifty (350) acres appear to have been in cultivation for the growing of sugar-canes, at the time of the happening of the occurrence involved in this action.

III.

The Court further finds from the evidence that several years prior to the execution of the contract which is the basis of this action, an Englishman named Swift had been engaged in attempting to promote the erection of a sugar central, to be financed by English or American capitalists and to be erected in the San German Valley, on the lands of the respondent copartnership. That even prior to the time when the said Swift was engaged in said negotiations and for a number of years prior thereto, certain of the cane growers and planters of the said San German Valley, headed by one Antonio Cabassa, had been endeavoring either through their own efforts or by attempting to interest capitalists in their proposed enterprise to secure the construction and erection of a sugar central for the use of
the said sugar-cane planters of said vicinity; and it appears
85 from the evidence that it had been agreed that the name of
the said proposed sugar central should be "Eureka," that at the time that the said Swift commenced his negotiations respecting

the erection of the said central, in about, the year 1904, a number of the planters of sugar-cane in said vicinity, including the said respondent copartnership, had entered into agreements for the sale and delivery of their sugar-canes to be raised by them, for a period of years, to one Noble and one Arpin, who were then attempting to promote the said enterprise for the construction of the said projected sugar central; that the said agreements and contracts of said planters, including the said copartnership, with the said Noble and Arpin were assigned and transferred to the said Swift who actively continued the prosecution of negotiations and the promoting of the construction of the sugar central in said vicinity.

It further appears from the evidence that during the Spring and Summer of the year 1906, the said Swift continued his efforts and negotiations respecting the construction of said projected Central Eureka, but that no active steps were taken at the site chosen for the construction of the projected sugar central toward the actual construction or erection thereof, unless perhaps there was some clearing of the ground or the construction of some fence marking the boundary of said site. That on September 3, 1906, an attorney, F. H. Dexter, of San Juan, Porto Rico, acting on behalf of Antonio Cabassa representing the said cane planters, sent a cablegram to the said Swift who was then in England, as follows:

"Colonos demand from you that Bank of England should furnish immediate guarantee if the deposit of fifty thousand pounds has been made for the erection of Eureka."

That on the 21st. of September the said Cabassa, together with Clementi Javierre, one of the copartners of the respondent copartnership, sent a further cablegram to the said Swift, in London, declaring that all negotiations with the said Swift were at an
86 end and that they had found other parties who were able to make the required deposit or guarantee.

IV.

That there was evidence tending to prove that on October 20, 1906, a meeting was held which was attended by the said Cabassa, one Mateo Fajardo, and other cane planters of said vicinity including the said Clementi Javierre, a member of the respondent copartnership, and that at the said meeting, which was held at the house on the property known as Dos Hermanos and belonging to the wives of the said Javierre and Gil, after a discussion of the situation was had, the following Memorandum of Agreement was made and entered into by the parties attending the same, to-wit:

"Having met at Hacienda Dos Hermanos on the 20th of October, 1906, upon invitation from Don Antonio R. Cabasa y Tasara to confer about the installation of central Eureka in view of the delay, and it being almost sure that Mr. A. E. H. Swift with whom Mr. Cabasa had a contract for installing said central has not been able to accomplish it, a meeting was held by Messrs. Clement Javierre for Javierre and Gil, Maeto Fajardo, Luis Fajardo and Mr. Cabasa, who having heard the reasons set forth by Mr. Cabasa all agreed as to the necessity of installing said Central and in order to accomplish

such beneficial and necessary project they all agreed to carry same into effect, purchasing the establishments and the surrounding lands from Messrs. Fajardo, for the erection thereon of said Central Eureka, under the following conditions:

1. To organize a company for that purpose as soon as Messrs. Matias Gil, D. L. Thompson would arrive, they being absent.

87 2. The Corporation to be denominated "Central Eureka" and the factory to be installed in the establishments of Messrs. Fajardo, hereinbefore mentioned, which shall be purchased at the price agreed upon by the incorporators.

3. The incorporators bind themselves to sell their canes to this central during ten years, commencing from the one of 1908, as regards Javierre and Gil, Cabassa and Luis Fajardo, and after the expiration or cancellation of his contract with Guanica Central, as to Mr. Mateo Fajardo.

And for safety and record for all concerned a copy is issued to each of the interested parties who sign below.

(Signed) CLEMENTE JAVIERRE.
A. R. CABASA.
M. FAJARDO.
L. FAJARDO."

But the court finds that if in fact Javierre was present and signed the alleged agreement of October 20, 1906 he did not consider himself bound by it.

V.

The Court further finds from the evidence that after the said meeting of the said planters, of October 20, 1906, if the same was held no active steps were taken by the said Planters for some time looking to the carrying out of the projected central which was discussed at the said meeting of October 20th, and that the first evidence of any activity with reference thereto was shown by certain estimates for the remodeling of the old sugar factory San José mentioned in the proceedings of the alleged meeting of October 20th, and of installing new machinery therein; which estimates were prepared under date of November 29, 1906, by an engineer H. L. Thompson and submitted to the said Cabasa on behalf of the parties proposing to reconstruct the old San José mill, in accordance with the action taken at the meeting of October 20th, if the same was held.

88 That it does not appear from the evidence that thereafter any active steps were taken looking to the erection of said mill by the said cane planters for several months, except that the witness Thompson testified that he was engaged in securing options on secondhand machinery in different parts of Porto Rico and had written for estimates for the machinery for the proposed reconstruction of said mill to manufacturers; and it appears that Mateo Fajardo, one of the planters attending the said alleged meeting of October 20th, testified and was supported by the evidence of several witnesses, to the effect, that he was attempting to negotiate loans for the purpose of realizing funds to be used in paying his proportion

of the cost of the proposed factory to be erected by said planters. It appears from the evidence that the said Javierre did not take any active part in preparing for the erection or construction of the said mill, but he testified that this was owing to the fact that he was waiting for the return of his partner Gil, who was then in Spain and who did not return until about the month of March, 1907.

VI.

It further appears from the evidence that about the first of May, 1907, the respondents Javierre & Gil, together with the said Fajardo and others, did incorporate a company under the laws of Porto Rico and under the name of the "Central Eureka, Incorporated," and that thereafter the said incorporation filed its articles in accordance with the laws of Porto Rico completing its organizatio- and proceedings with the construction of a certain mill known as Central Eureka under said incorporation, and had at the time of the trial of said cause expended large sums of money toward the reconstruc-
89 tion and equipment of the said proposed central; and that the said Javierre & Gil, as appears from the evidence, were both officers and large stockholders of the said incorporation.

VII.

It further appears from the evidence and the Court finds that after the completion of the grinding of the sugar crop of 1906, a number of interviews and communications were had and passed between the representatives of the complainant Central Altagracia and the respondent copartnership Javierre & Gil, respecting the matter of the execution of a contract between the said respondent copartnership and the said Central Altagracia for the grinding of canes to be raised by the said copartnership in future years. That in connection with said negotiations no definite conclusion was arrived at until the 10th day of December, 1906, when the said complainant and the said respondent copartnership, through the partner Javierre, entered into the following agreement:

"Between the 'Central Altagracia,' party of the first part, and Javierre y Gil, party of the second part, the following contract is on this day entered into the same to be binding as if it had been executed before a Notary pending its execution by public deed whenever called for by any of the aforesaid parties.

Specifications.

I.

The canes standing on the property of the party of the second part situated in the municipal district of Mayaguez, known under the name of Florentina and Estero, of 500 cuerdas, more or less, shall be ground hereafter in the mill of the party of the first part
90 and under the conditions hereinafter set forth. For the coming crop there shall be available 320 cuerdas of cane, of which 191 cuerdas will be plant cane and the balance ratoons. For the

crop of 1907 to 1908 there will be 320 cuerdas of cane, cuerdas of plant-cane and ratoons.

II.

The canes shall not be cut until they are ripe and shall be delivered in the daily quantity fixed off-hand by the Central, cut in pieces of not more than three feet, good and sound, free of dried leaves, stalks, and suckers, laid on the freight cars of the line of the American Railroad Company of Porto Rico, in case the party of the second part should have a switch therefor, otherwise to be delivered on carts at the mill of the Central.

III.

All expenses in connection with the delivery of the cane in freight cars at the station of Hormigueros shall be borne by the party of the second part, the other expenses, up to the conversion of the cane into white sugar, to be paid by the party of the first part.

IV.

The cane shall be weighed in the scale of the Central, annexed to the mill, the party of the second part having at all times the right to inspect the operation personally or through its representatives.

V.

The party of the first part shall not be required to receive cane not being entirely ripe, and the party of the second part
91 should not commence cutting until the party of the first part has made an examination of the cane and grant the authorization therefor.

VI.

Should the party of the second part in violation of condition II. and V. of this contract send to the Central cane which does not conform to the conditions agreed upon, the party of the first part shall have the right to make such reduction in the weight as it deems necessary for due protection of its interests, but giving notice thereof to the party of the second part.

VII.

The grinding season in the Central covers the months from December to June both inclusives. The delivery and grinding of canes might continue after the month of June, should it suit both parties.

VIII.

The party of the second part shall furnish the party of the first part not later than October first, a note of the canes which he expects will be available for cutting during each month of the crop, which note is required by the party of the first part in order to make before-hand arrangements for transportation and grinding.

IX.

For each hundred (100) pounds of goods cane, free of suckers, dry leaves, and stalks, which the party of the first part shall
92 receive, he shall pay to the party of the second part the amount of five and a half lbs. of white sugar of 96 degrees of polarization, in American currency, which value in cash shall be the average obtained during the previous month for white sugar of 96 degrees in the New York market, deducting one-fourth of a cent per pound calculated to be for expenses and freight.

X.

The settlement and delivery of the amount which according to the preceding clause the party of the first part is to make, shall be made within the first eight days of each month.

XI.

When through any accident or breakage of the machinery or on the tracks of the transportation line, the Central Altagracia be prevented from receiving canes, its manager or its substitute shall duly notify the party of the second part in order to suspend the cutting of cane, and if the trouble has not been corrected within eight days the cane that has already been cut might then be ground in another mill, delivering the proceeds to Central Altagracia in case of any indebtedness with said central, otherwise to dispose freely of same. If, after fifteen days the Central could not continue grinding, then the party of the second part might keep on cutting its cane and grind it wherever it suits him, under the conditions aforesaid, until the Central Altagracia starts again grinding.

XII.

In case of fire in the canes during the grinding season, the
93 party of the second part shall notify "Central Altagracia," and said canes shall be ground as soon as possible with reference to all others provided they are in good condition therefor and the condition of the grinding permit it. The price of this cane shall be subject to especial agreement between the parties.

XIII.

The party of the first part shall have at all times the right to suspend temporarily the cutting, if the cane-liquor obtained from these canes, ground in its mill, should contain after chemical analysis less than 13 per cent. of sucrose or have less than 30 of purity. It is understood however, that the cane actually cut at the time of the suspension must be received by the party of the first part without any claim whatsoever.

XIV.

* * * * * * *

XV.

The party of the second part during the life of this contract cannot sell, donate, lease nor mortgage its property, nor lay any incumbrance

upon it, nor upon its fruits unless it be agreed upon that this contract shall be respected in all its parts. The Central Altagracia may transfer this contract or any part thereof, provided that all conditions therein set out be complied with.

XVI.

If during the term of this contract the party of the first part should agree with the party of the second part to advance the latter
94 any sum for expenses in connection with the planting, cultivation, etc., of the canes, it shall be the subject of a special contract in a separate document.

XVII.

The party of the first part may have during the grinding season at the loading stations an employee or agent to prevent the loading of canes not acceptable.

In testimony whereof, the parties hereto sign this document in duplicate in the presence of witnesses Wm. Falbe and Carmelo Alemar, each of the contracting parties keeping a copy thereof.

In Mayaguez the 10th of December, 1906.

CENTRAL ALTAGRACIA, INC.
F. L. CORNWELL, *President.*

JAVIERRE & GIL,
WM. FALBE.
C. ALEMAR, JR.

Clause XIV. is amended as follows: The term of the present contract shall be for Five crops beginning with that of 1906-7; provided, however, that if on the 15th of January, 1908, the projected Eureka Central has been erected or is being erected, the party of the second part shall have the right to cancel the present contract giving notice thereof to the party of the first part on the first of October 1907.

Addition: The party of the first part agrees to place at the
95 Hormigueros station sufficient number of freight cars, each working day, in order that the party of the second part might load about one hundred tons of cane daily, excepting in cases of "force majeure."

Date et retro,

CENTRAL ALTAGRACIA, INC.
F. L. CORNWELL, *President.*

JAVIERRE & GIL,
WM. FALBE,
CARMELO ALEMAR, JR.

In the execution of this agreement, which was on a printed form used by the Altagracia Company in making similar contracts, Section XIV of the printed form was erased, and by agreement which was incorporated therein, the same was added as amended and as the same appears at the conclusion of the said contract.

VIII.

The Court further finds that at the time of the execution of the said contract of December 10, 1906, between complaninat and respondent copartnership, that it was not generally known at Mayaguez, or in the vicinity where the parties hereto resided and did business, that the said sugar-cane planters who claimed to have met on the 20th of October, as set forth in these findings, had held any such meeting or that there was any proposal among the said local planters at said time, to erect the central in the San German Valley, or in that vicinity, to be known as the Central Eureka. And the
96 Court further finds from the evidence that at said time the said Swift had not abandoned his project for securing contracts and erecting or causing to be erected a sugar central in said vicinity, but that he then was and continued for some months thereafter still engaged in efforts of carrying on further negotiations for the erection of such a central. The Court finds from the evidence that many or most of the contracts which the said Swift had with the said planters were expiring or had already expired, and that at the time of the execution of the said contract between complainant and the said respondent copartnership, on December 10, 1906, the said Swift had not done any active work on the ground toward the construction of the said sugar mill or central.

IX.

The Court further finds from the evidence that the respondent copartnership has not proven by a preponderance of the evidence, that the projected Eureka Central mentioned in Clause XIV., as amended, of the contract of December 10, 1906, referred to the projected enterprise which was initiated at the alleged meeting on October 20, 1906, of the said sugar-cane planters and the said respondent copartnership, has not shown by a preponderance of the evidence, that the projected central Eureka mentioned in the said Paragraph XIV. of said contract of December 10, 1906, was not the project known as the Swift Eureka, in which enterprise the said respondents had been interested, as heretofore determined.

X.

The Court further finds from the evidence that the respondent copartnership did serve the notice on the complainant company on the first day of October, 1907, of its intention to cancel the said contract of December 10, 1906, claiming that the central then being constructed by the respondent copartnership and others was
97 the Central Eureka referred to in said Paragraph XIV. of the said contract of December 10, 1906. The Court finds, however, from the evidence that the said projected Central Eureka, under the project of the said Swift, was not at any time up to the trial of this action either constructed or in process of construction.

XI.

The Court further finds from the evidence that after the 20th of October, 1906, the respondent Javierre, representing the respondent

copartnership, had certain negotiations and attempted to make a contract with the Guanica Central for the grinding of the sugar-Canes of said respondent copartnership for the period of one year, but that no contract was made with the said Guanica Central because the said Central was unwilling to pay the price demanded by the said Javierre for said sugar-cane, unless a contract be made for the same for a period of five (5) years.

XII.

It further appears from the evidence and the Court finds that after the completion of the grinding of the sugar crop of 1906, one Mr. Cornwell, the manager of the complainant Company, made a number of efforts to secure a contract with the respondent copartnership for grinding their canes for a number of years, and that the said respondent Javierre put off the said Cornwell with various excuses and reasons until the 10th of December, 1906, when the contract in controversy was finally executed.

XIII.

The Court finds that there is great controversy to what actually occurred at the time of the actual signing of the contract of December 10, 1906, That the said so-called Swift project for a central to be known as Eureka was well known and much discussed in the vicinity of Mayaguez; and the Court finds that the alleged
98 proposal to erect a central Eureka by the said planters including the said respondents Javierre & Gil, was not generally known at said time; that the burden of proof in this cause as to the identity of the projected Central Eureka referred to in the said amended Paragraph XIV. of said contract of December 10, 1906, was on the respondents, and that the said respondents did not maintain or prove by a preponderance of the testimony that the said projected Central Eureka referred to in the said clause of said contract, was not the said projected central of Swift, or that the same was the projected central which has since been erected by the said planters including the said respondents under the said name of Eureka.

XV.

The Court further finds from the evidence that the said Swift long after the said 10th day of December, 1906 continued his efforts to secure new contracts for the construction of his proposed sugar central in San German Valley; that a meeting was held about the month of March, 1907, called by the said Cabasa at the instance of the said Swift, at which a number of said planters were in attendance and at which further propositions of the said Swift to said planters were discussed, although the respondent Javierre y Gil did not attend the said meeting; and further, that the said Swift was corresponding and attempting to negotiate with the engineer Thompson and others respecting his proposed enterprise as late as the month of April, 1907; and it is shown by letters written by the said Swift, in the month of April 1907, that he still hoped to build his Eureka central,

XVI.

The Court finds that the said D. L. Thompson who was claimed to be connected with the alleged enterprise of Oct. 20. 1906 from its inception, was negotiating with Swift and other parties as late as April 1907.

The foregoing is settled and signed to the satisfaction of the respective counsel and the Court as the statement of facts in the nature of a special verdict as set out in the heading, this 3rd day of June 1908.

B. S. RODEY, *Judge.*

99 In the District Court of the United States for Porto Rico.

CENTRAL ALTAGRACIA, INCORPORATED,
vs.
JAVIERRE & GIL ET AL.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing to be a true copy of a "Statement of Facts in the Nature of a Special Verdict" filed in the above-entitled case under date of June 3, 1908, as the same remains on file in my office.

Witness my official signature and the Seal of said Court, at San Juan, in said District, this third day of June, A. D. 1908, and in the 132nd year of the Independence of the United States of America.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk, Dist. Court of U. S. for P. R.

Endorsed on cover: File No. 21,220. Porto Rico D. C. U. S. Term No. 424. Clemente Javierre, Matias Gil, and Felix Ramos, copartners, doing business under the firm name of Javierre & Gil, *et al.*, appellants, *vs.* Central Altagracia, Incorporated. Filed June 9th, 1908. File No. 21,220.

IN THE

SUPREME COURT OF THE UNITED STATES

CLEMENTE JAVIERRE, ET AL.,
Appellants,

vs.

CENTRAL ALTAGRACIA, INC.,
Appellee.

No. [redacted] 171.

BRIEF OF ARGUMENT OF APPELLANTS AGAINST APPELLEE'S MOTION TO DISMISS THIS APPEAL.

Come the appellants in the above entitled cause, by Hartzell & Rodriguez-Serra, their attorneys of record, and hereby pray the Court to overrule the motion of the appellee to dismiss the appeal pending herein, or to affirm the final decree of the court below. And as reasons therefor, the appellants beg to submit the following:

I.

Appellants deny the allegations made in Paragraph first of said motion, and, on the contrary, assert that the transcript of record transmitted from the court below contains a statement of the facts of the case in the nature of special verdict, duly and properly certified from the said court. Said statement of facts was settled and signed to the satisfaction of the respective counsel and the Court as such statement of facts in the nature of special verdict, as set out in its heading, on the 3rd day of March, 1908.

II.

Appellants deny the allegation of Paragraph second of said motion, that each and every one of the errors assigned in the transcript of the record to the proceedings in the court below involves and is based upon the existence of a finding of fact

alluded to in Paragraphs IV, V, VIII and XII of said statement of facts. On the contrary, appellants assert that many of the errors assigned by the appellants do not involve and are not based upon the existence of the findings of fact alluded to in said motion. That the errors assigned in Paragraphs I, II, III, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVII of the Assignment of Errors contained in the transcript of record are not based upon the existence of such a finding of fact. That some of said errors involve mere questions of law, which the Court may consider without said statement of facts, upon the pleadings and opinion of the court below, particularly errors assigned in Paragraphs I, II, VII, VIII, IX, X, XII, XIII, XV, XVI and XVII of the Assignment of Errors filed by appellants, which is contained in the transcript of record transmitted from the court below. That the questions involved in said errors are questions which this Court may consider upon said appeal, and are sufficient to base a review or reversal of the final decree of the court below, without the necessity of said Statement of Facts.

Appellants deny the allegation of said motion that the court below refused to find as a fact that a meeting of certain parties, held on the 20th day of October, A. D. 1906, alluded to in Paragraphs IV, V, VIII and XII of the Statement of Facts, was actaully held on said date, as claimed. On the contrary, appellants assert that all the facts which are described in said Statement of Facts, including the facts stated in Paragraph IV of said Statement of Facts, were facts which the court below actually did find from the evidence introduced in the case.

III.

Appellants submit to the Court the fact that the moving party has not served on counsel for appellants a copy of his brief of argument, if any has been filed, as required by Rule 6 of this Court, and, therefore, this party is not enabled to answer any argument in favor of said motion, which does not appear on the motion itself, copy of which was served on counsel for appellants, at San Juan, Porto Rico.

Respectfully submitted,

Chas. Hartzell & Rodriguez-Serra,
Counsel for Appellants.

Dated New York, March 19, 1909.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INC., APPELLEE.

Comes Central Altagracia, Incorporated, the appellee in the above-entitled cause, by F. L. Cornwell and N. B. K. Pettingill, its counsel of record, and hereby moves this court to dismiss the appeal now pending herein or to affirm the final decree of the court below, for the following reason, to wit:

I.

Because the transcript of record transmitted from the court below contains no statement of the facts of the case in the nature of a special verdict, nor any ruling of the court below on the admission or rejection of evidence, duly certified from said court as a part thereof, nor is any error assigned therein to any ruling of the court below upon the pleadings in said cause, wherefore the said transcript of the record contains nothing which this court can consider upon said appeal or upon which this court can base a review or reversal of the final decree of the court below therein.

II.

Because, even if the document annexed to said transcript of record and entitled "Statement of Facts in the Nature of a Special Verdict" could be considered a part of said transcript, each and every of the errors assigned in said transcript to the proceedings of the court below involves and is based upon the existence of a finding of ultimate fact that a meeting of certain parties, claimed to have been held on the 20th day of October, A. D. 1906, alluded to in paragraphs IV, V, VIII, and XIV of said document so entitled as aforesaid, was actually held on said date as claimed—a claim which the court below refused to find as a fact, as will appear from a mere perusal of said paragraphs thereof numbered as aforesaid, and, in the absence of a finding of the holding of said meeting at the time stated as an ultimate fact, said errors are based upon an unfounded premise and cannot be considered.

Wherefore the said appellee moves the court for an order of dismissal or affirmance for the reasons aforesaid.

F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE ET AL., *Appellants*,
vs.
CENTRAL ALTAGRACIA, INC., *Appellee*.

GENTLEMEN: Please take notice that the appellee in the above-entitled cause will, on the 22d day of March, 1909, between the hours of 12 o'clock noon and 1 o'clock p. m., or as soon thereafter as counsel can be heard, in the Supreme Court room in the City of Washington, District of Columbia, in open court, move this court to dismiss the appeal now pending herein or to affirm the final decree of the court below.

Together with this notice appellee serves upon counsel of record for the appellants a copy of said motion to be filed in said Supreme Court, which is hereby made a part hereof.

Dated at San Juan, Porto Rico, this 24th day of February, A. D. 1909.

F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel of Record for Appellee.

To Messrs. Charles Hartzell and M. Rodriguez Serra, counsel for appellants.

Service accepted of a copy of the above motion and notice at San Juan, Porto Rico, this 24th day of February, 1909.

CHAS. HARTZELL,
Of Counsel for Appellants.

BRIEF IN SUPPORT OF MOTION.

Statement.

The transcript in this case is transmitted upon an appeal taken by the defendants in the court below from a decree against them in an equity cause decided by the District Court of the United States for Porto Rico. The final hearing was had upon the pleadings and evidence, and the final decree was in favor of the complainant, now appellee, and enjoined appellants from delivering a certain number of crops of sugar cane raised or to be raised upon certain described lands during a specified period to a certain sugar factory other than the appellee in violation of a certain contract between appellants and appellee, a corporation, whose business also was the running of a sugar factory.

The record transmitted contains all the pleadings in the case, the opinion of the court upon the merits, the final decree, the petition of appeal and other proceedings perfecting the same which were completed January 11, 1908 (Transcript, pp. 44-5); but up to the point of its conclusion, by the certificate of the clerk and the seal of the court (Transcript, p. 53), there is no compliance with the provision of section 2 of the act of Congress of April 7, 1874 (18 Stats., p. 27), by the inclusion in said transcript of any findings of fact in the nature of a special verdict. There is, however, following the certificate of the clerk as to the correctness and completeness of the transcript proper, and attached to said transcript, a certified copy of a certain document, labeled as, and doubtless intended to be, findings of facts, but which is dated *June 3, 1908* (Transcript, pp. 54 to 64).

The first ground of the motion now made is based upon the proposition that the said document, so annexed to the duly certified transcript of record as aforesaid, cannot be con-

sidered as a part thereof. The remaining grounds are based upon the contingency that the court may hold that said document is properly a part of said transcript.

As nothing in this motion affects the merits of the questions attempted to be raised upon said appeal, a more detailed statement of the actual controversy in the court below seems unnecessary.

ARGUMENT.

It has been held in several decisions of this court that a motion to dismiss or affirm may properly be made upon the grounds that the appellants' proceedings have been taken merely for delay or that the questions involved are so well settled that further argument upon them would be of no avail.

Hinckley *vs.* Morton, 103 U. S., 764.
Chanute City *vs.* Trader, 132 U. S., 210.
Equit. Life Ass. Soc. *vs.* Brown, 187 U. S., 308.

And in a still more recent case a writ of error was dismissed by this court upon its own motion on the ground that the points raised thereby had been repeatedly settled in this court against the plaintiff in error and were in effect frivolous.

Kent *vs.* People of P. R., 20 U. S., —.

I.

The first ground of the motion, as above indicated, is based upon the entire want of any finding of facts in the nature of a special verdict as required by the act of April 7, 1874, regulating appeals to this court from the Supreme Courts of Territories, as the document attached to the transcript and labeled "statement of facts" was signed by the judge long after the appeal had been perfected. This court

has repeatedly held that, where no such statement is contained in the record, there is nothing which this court can re-examine; hence the appeal should be dismissed as frivolously taken or the judgment of the court below affirmed.

Gray *vs.* Howe, 108 U. S., 12.
Salina Stock Co. *vs.* Salina Creek Co., 163 U. S., 118.
Thompson *vs.* Ferry, 180 U. S., 484.

In addition to the foregoing, a long line of cases, of which Harrison *vs.* Perea (168 U. S., 323) and Haws *vs.* Victoria Ming. Co. (160 U. S., 303), and cases therein cited, are instances, hold that this court upon such appeals will, where no questions are raised as to the pleadings or evidence, confine itself purely to the question whether the judgment or decree is sufficiently supported by the facts contained in the statement provided by said statute.

It may be contended that even where there are no findings the opinion of the court when containing a statement of the facts might be used in place of the formal findings, but this court has held to the contrary.

Saltonstall *vs.* Birtwell, 150 U. S., 419.

In view of this long line of decisions, stating the law as to the method of obtaining a review in this court, we submit that failure to comply therewith should cause appeals to be regarded as frivolous within the rule laid down in Hinckley *vs.* Morton and other cases *supra*.

II.

The second ground of the motion is predicated upon the contingency that this court may consider the document annexed to the transcript to be a part thereof.

In that event we submit that those findings so clearly support the decree and are so clearly inconsistent with the

premises alleged in the assignments of error that the appeal should still be considered frivolous and unwarranted.

It has been repeatedly held that "the statement of facts required by the statute should present clearly and precisely the ultimate facts."

U. S. Trust Company *vs.* New Mexico, 183 U. S., 535.

Crowe *vs.* Trickey, 204 U. S., 228.

A perusal of the document referred to as the statement of facts (pages 54 to 64), in connection with the final decree (pages 43-44), will be sufficient to convince the court that every ultimate fact found directly supports the decree, while the various assignments of error necessarily involve the assumption that a certain meeting alluded to in paragraphs IV, V, VIII, and XIV of the "statement of facts" was actually held, as claimed by appellants, while said statement fails to support such claim, but refers in each instance to such meeting as an alleged meeting and to the evidence at its strongest as "tending to prove" certain things about the same.

This court has distinctly held that, where the necessary legal effect of the findings of fact is inconsistent with the basis of the assignments of error, the points raised by the latter cannot be considered.

Young *vs.* Amy, 171 U. S., 184.

III.

We therefore respectfully urge that either the motion to dismiss or the motion to affirm be granted.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Solicitors for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. [redacted].

CLEMENTE JAVIERRE ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INC., APPELLEE.

RESPONSE OF APPELLEE TO APPELLANTS' OBJECTIONS AS TO NOTICE ON ITS MOTION TO DISMISS OR AFFIRM.

Counsel for appellants in their brief against this motion have alleged in their paragraph III that they have not been served with a copy of our brief, as required by Rule 6 of this court. In order to avoid any question as to the proper practice in a motion of this kind, counsel for appellee decided to waive the presentation of this motion under the original notice served upon Mr. Charles Hartzell, of counsel for appellants, on the 24th day of February, 1909, as shown in the printed motion with said original notice attached, and served a new notice on the 22d day of March, 1909, upon Mr. M. Rodriguez Serra, of counsel for appellants, which was served together with a copy of the

printed motion, notice, and brief, as shown by the original, now on file with the record in this cause, a copy of said notice and acceptance of the service of same being as follows:

"IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE ET AL., *Appellants*,

vs.

CENTRAL ALTAGRACIA, INC., *Appellee*.

GENTLEMEN: Please take notice that the appellee in the above-entitled cause will on the 12th day of April, 1909, between the hours of 12 o'clock noon and 1 o'clock P. M., or as soon thereafter as counsel can be heard, in the Supreme Court room, in the city of Washington, District of Columbia, in open court, move this court to dismiss the appeal now pending herein or to affirm the final decree of the court below.

Together with this notice appellee serves upon counsel of record for the appellants a copy of said motion, and the brief in support thereof, to be filed in said Supreme Court, which is hereby made a part hereof.

Dated at Washington, D. C., before noon, this 22d day of March, A. D. 1909.

N. B. K. PETTINGILL.
F. L. CORNWELL.

To Messrs. CHARLES HARTZELL and M. RODRIGUEZ SERRA,
Counsel for Appellants.

Service of a copy of the above-mentioned motion, original notice, brief in support thereof, and the above supplemental notice, at Washington, D. C., prior to noon, this 22d day of March, 1909.

M. RODRIGUEZ SERRA,
Of Counsel for Appellants."

This motion is therefore submitted to the court on this 12th day of April, 1909, in pursuance of said supplemental notice, copied above, and served, as therein shown, three weeks prior to said date of submission.

We therefore again respectfully submit that said motion to dismiss or affirm should be granted upon the grounds set forth in the motion as supported by the brief therewith filed.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Counsel for Appellee.

9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 171.

CLEMENTE JAVIERRE, MATIAS GIL, AND FELIX RAMOS, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF JAVIERRE & GIL, ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF AND ARGUMENT OF APPELLANTS.

CHAS. HARTZELL,
MANUEL RODRIGUEZ SERRA,
Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 171.

CLEMENTE JAVIERRE, MATIAS GIL, AND FELIX RAMOS, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF JAVIERRE & GIL, ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF AND ARGUMENT OF APPELLANTS.

Statement of the Facts.

The appellee, the Central Altagracia, a corporation organized under the laws of the State of Maine, with the object and purpose of carrying on the business of manufacturing sugar from sugar-cane in the Island of Porto Rico, acquired, in the year 1905, by contract, control of a certain sugar factory already erected, and made certain improvements and additions thereto, and in said year commenced the operation of the same and the manufacture of sugar, in accordance

with the object of its incorporation. The location of the said factory was at a point about five miles north or northeast of the city of Mayaguez, Porto Rico.

That said company did not engage in the planting or raising of sugar-cane, but in the conduct of its business depended upon securing its supply of canes by purchase from planters living in that vicinity, and that from the date of the establishment of said business by said appellee, in 1905, until after the happening of the matters in controversy in this action, the said appellee conducted its said business in manner and form as hereinbefore stated.

That the appellants, Clemente Javierre, Matias Gil, and Felix Ramos, are, and for some time past have been, the members of an agricultural copartnership, engaged in the planting and raising of sugar-canes, under the firm name and style of "Javierre & Gil."

That the lands upon which the operations of the said agricultural copartnership are carried on lie at a point about five miles south from the said city of Mayaguez, and are the property of the wives of the said partners, Javierre and Gil, the said lands, however, being cultivated by the said agricultural copartners under some arrangement for that purpose, and that at the times mentioned in this controversy the said appellants, copartners, had planted and under cultivation with sugar-cane between two hundred and three hundred acres of said lands.

That for several years prior to the times of the occurrences related in this controversy, a man by the name of Swift, being, as alleged, a British subject, had been engaged as a promoter in attempting to arrange for contracts for the purchase of sugar-cane from the planters in the said neighborhood, and which would enable him, the said Swift, to secure the funds necessary for the construction and erection of a new sugar-mill in that vicinity, and which enterprise was, in the prospectuses issued by the said Swift, called by the name of "Eureka," but, as is alleged in the bill of complaint,

at paragraph 7 thereof, and is also conceded in the answer, and as was fully shown by the evidence in the case, the said Swift project wholly failed and was abandoned during the latter part of the year 1906, for the reason that the said Swift had failed to make satisfactory arrangements with such planters and parties to raise the money necessary to carry out his said project.

That in connection with the failure of the said Swift to so carry out his said project, certain of the planters who had theretofore been negotiating with the said Swift, including appellants herein, definitely ceased and positively refused absolutely to have any further business relations or connection with the alleged Swift enterprise, and cables to that effect were duly sent to the said Swift during the fall of 1906, and it was generally understood and agreed, as alleged in the pleadings herein, that the said Swift enterprise had been wholly and entirely abandoned.

That on December 10, 1906, and after the scheme of the said Swift had been so abandoned, the appellants, through Clemente Javierre, one of the partners, entered into a contract with the appellee, through its president, F. L. Cornwall, for the delivery to appellee of all sugar-canes to be raised by appellants on the premises described in said complaint for grinding, under certain terms and conditions set forth in said contract, and which is set forth in full as Exhibit "A" to the bill of complaint, and contained at folios 13 to 17 of the transcript of the record.

That the said contract was prepared by adopting the printed form regularly used by appellee in making contracts with cane-growers, and that the said printed form was followed in its entirety with the exception of the 14th paragraph or clause thereof, which clause is the one providing for the duration of the term of the contract.

That the said 14th paragraph of said contract was modified so as to read as follows:

> "The duration of this contract will be five crops, beginning with that of 1906-1907, it being under-

stood, however, that should the projected central 'Eureka' be constructed or in course of construction on the 15th of January, 1908 (1908), the party of the second part will have the right to cancel this contract, giving notice thereof to the party of the first part on October 1st, 1907, *Addition*. The party of the first part binds itself to place at Hormigueros station sufficient cars, on each working day, in order that the party of the second part may load about one hundred tons of cane daily, save cases of force majeur (fuerza mayor)."

Prior to the execution of said contract and on October 20, 1906, a meeting of sugar planters living in the vicinity of the lands occupied by appellants was held, at which meeting the appellants were represented by Clemente Javierre, and at which said meeting the failure of the said Swift enterprise was discussed, and the necessity for the establishment of a mill for grinding the cane of such parties was likewise talked about and taken into consideration, and as a result there was then and there adopted and signed by the parties present, including the said appellants, copartners, the following memorandum of agreement, to wit:

"Having met at Hacienda Dos Hermanos on the 20th of October, 1906, upon invitation from Don Antonio R. Cabasa y Tasara to confer about the installation of central Eureka in view of the delay, and it being almost sure that Mr. A. E. H. Swift, with whom Mr. Cabasa had a contract for installing said central, has not been able to accomplish it, a meeting was held by Messrs. Clemente Javierre for Javierre and Gil, Mateo Fajardo, Luis Fajardo and Mr. Cabasa, who, having heard the reasons set forth by Mr. Cabasa, all agreed as to the necessity of installing said central, and in order to accomplish such beneficial and necessary project they all agreed to carry same into effect, purchasing the establishments and the surrounding lands from Messrs. Fajardo for the erection thereon of said Central Eureka, under the following conditions:

"1. To organize a company for that purpose as soon as Messrs. Matias Gil and D. L. Thompson would arrive, they being absent.

"2. The corporation to be denominated 'Central Eureka' and the factory to be installed in the establishment of Messrs. Fajardo, hereinbefore mentioned, which shall be purchased at the price agreed upon by the incorporators.

"3. The incorporators bind themselves to sell their canes to this central during ten years, commencing from the one of 1908, as regards Javierre and Gil, Cabasa and Luis Fajardo, and after the expiration or cancellation of his contract with Guanica Central as to Mr. Mateo Fajardo.

"And for safety and record for all concerned a copy is issued to each of the interested parties who sign below.

"(Signed) CLEMENTE JAVIERRE.
"A. R. CABASA.
"M. FAJARDO.
"L. FAJARDO."

That said memorandum of agreement provided for the reconstruction and erection of a sugar mill, to be known by the name of "Eureka," and that there should be incorporated a company for the purpose of carrying out the general plan of the reconstruction and operation of the said mill, and it was likewise provided, as appears thereby, that all of the sugar-canes which should be raised by the parties joining in the said enterprise, for the period of ten years from said time, should be sold to and ground at the said mill proposed to be so reconstructed and erected under said agreement. (See transcript of record, folios 86, 87.)

That in pursuance of the said agreement an engineer named Thompson, under date of November 29, 1906, prepared and submitted certain estimates for the reconstruction of the said mill mentioned in the said memorandum of agreement dated October 20 and in accordance therewith, but, as appears, no active steps were taken for the erection and reconstruction of the said mill so contemplated by said

planters' agreement for some months, except that the said engineer Thompson continued seeking options on new and second-hand machinery and in preparing estimates in connection with said work; and that another of the said planters, Mateo Fajardo, who was likewise a party to said agreement of October 20, was active in negotiating for a loan to pay his proportion of the cost of said proposed new factory. (Transcript of record, folio 88.)

That in May, 1907, appellants and others did incorporate a company under the name of "Central Eureka, Incorporated," and proceeded with the construction of a mill known as "Central Eureka," expending in and about the same large sums of money, and that at the time of the trial of the action in question it appears that the same had been practically completed.

That the said appellants, Javierre and Gil, were officers and large stockholders in the said enterprise, participating in all steps in the carrying out thereof. (Transcript of record, folio 89.)

On October 1, 1907, in accordance with the provisions of said clause 14 of said grinding contract, as amended and as heretofore set forth, appellants did serve on appellee the notice of its intention to cancel the said grinding contract, claiming that the projected Central Eureka was then being constructed under the terms of said contract. (Transcript of record, folio 97.)

This present action is a bill in equity, filed by appellee, seeking to enjoin appellants from selling or delivering their sugar-canes to be raised by them for the period of ten years to the said Central Eureka, which was then being erected by appellants and others in pursuance of the plan originating at the meeting of planters held on October 20, as hereinbefore referred to.

The said bill of complaint was filed on June 21, 1907, more than three months prior to the time when the said appellants might seek to take advantage of the provisions of

the said XIV paragraph of said cane-grinding contract of December 10, 1906, and the said action is based on the claim that the words "Projected Central Eureka," as used in paragraph XIV of the said grinding contract, as said paragraph was amended, referred to, and was known and understood to refer exclusively to what was known as the "Swift Eureka Project," and had no reference whatever to the Eureka mill, which appellants claim was originated at the planters' meeting of October 20, 1906, and in and by paragraph XII of the said bill of complaint, set forth at folios 7 and 8 of the transcript of the record, it is charged that the appellants, in combination and conspiracy with certain other parties therein named, and subsequent to the time of the making of the contract of December 10, 1906, had originated and incorporated the alleged Central Eureka, and said paragraph and others following charge that the conspiracy and combination in question was for the purpose of enabling appellants to claim that the said Central Eureka, which they were then constructing, was the identical mill referred to in said paragraph XIV of said contract, whereas complainant claims in said bill of complaint that the projected Central Eureka therein referred to was the so-called "Swift Enterprise" and none other.

In the answer filed by the defendant copartnership, appellants herein, it is fully denied that the Central Eureka referred to in and by the said fourteenth clause of said contract of December 10, 1906, was the Swift enterprise, and it is set forth that it was well known prior to the date of the said grinding contract that the said Swift project for a Central Eureka had been wholly abandoned, and it is alleged that the projected Central Eureka referred to in said contract was that which originated at the meeting of October 20, 1906, and which central was afterwards actually constructed.

The controversy then largely centers itself to the single proposition as to the identity of the projected Central Eureka referred to in the said paragraph XIV of the said contract

of December 10, 1906, and as to the question of the burden of proving the identity of such central.

The other defendant named in the bill of complaint, El Banco Territórial, was dismissed therefrom.

Assignments of Error and Points Relied Upon in the Argument.

1. (*a*) The error of the court in directing the issuance of an injunction in this case and holding that the contract for grinding of December 10, 1906, should be in force and effect for the period of five years, and,

(*b*) Error of the court in rendering and entering a decree in favor of appellee and against appellants, and in the issuance of any injunction in the premises.

2. Error of the court in holding that the relief granted in the action should be in the nature of injunction, whereas the only relief to which complainant could be entitled must be in the nature of specific performance.

3. Error of the court in holding that appellants, defendants below, must prove by a preponderance of the testimony that the projected Central Eureka referred to in clause fourteen of the grinding contract of December 10, 1906, was not the project known as the Swift enterprise.

4. Error of the court in holding that appellants had not proven that the proposed Central Eureka referred to in the fourteenth clause of said grinding contract was the Central Eureka which originated at the meeting of October 20, 1906, and which was subsequently constructed.

5. Error of the court in holding that the burden of proof in the case as to the identity of the Central Eureka referred to in said fourteenth clause of said grinding contract rested upon appellants, defendants below, and that said defendants

must establish their defense by a preponderance of the testimony.

6. The contract of December 10, 1906, for grinding cane is wholly unilateral, unjust and unconscionable in its terms as against appellants, defendants below, and therefore the same is incapable of being enforced by a court of equity, either affirmatively by way of specific performance, or negatively by way of injunction, and that the same is entirely without equity.

BRIEF AND ARGUMENT.

In presenting to the court our argument to sustain the appeal in this case, we are met at the outset by the fact that appellee has filed herein a motion to dismiss the same on the ground and for reasons which do not appear to be clear, or, at least, the consideration of which would seem to involve an examination and determination of the points raised upon our appeal.

It is, of course, conceded that if an inspection of the record on appeal should disclose that the same has been taken for the purpose merely of delay that the court will at once dismiss or affirm the decree of the lower court, and also that if it should appear, upon an inspection of the record, that the sape was frivolous that the same effect would follow, but as to what manner counsel can hope to apply any such doctrine to the appeal in this case we are compelled to confess our entire ignorance.

Counsel contend that the transcript of record does not contain a finding of fact in the nature of a special verdict, as required by the act of April 7, 1874, and seek to reject the statement of facts which is actually contained in the record for several reasons which would appear to be without merit.

We contend that this statement of facts set forth at folios 83 to 99 of the transcript of the record not only appears to

be in entire conformity with the requirements of the act of Congress referred to, but it is recited therein, in the last paragraph thereof, at folio 99 of the transcript, that the same is settled and signed to the satisfaction of the respective counsel and court, as the statement of facts in the nature of a special verdict, and we shall assume that the said statement of fact is at least in substantial compliance, and, in fact, we contend an absolute and full compliance with the requirements of said act of Congress, and upon the same, together with the balance of the record, we shall take the liberty of presenting our arguments.

Counsel likewise ask to dismiss the appeal upon the ground that the statement of facts as set forth in the record fully supports the decree of the court below, but as this assumption involves a discussion and consideration of the points raised by the appeal we shall present those points, secure in the belief that the court will investigate the merits of the matters presented, to the end that justice shall be done.

Points of Argument.

1. THE COURT ERRED IN HOLDING THAT THE CONTRACT FOR GRINDING OF OCTOBER 10, 1906, SHOULD BE ENFORCED FOR A PERIOD OF FIVE YEARS, AND IN DIRECTING THAT THE INJUNCTION SHOULD BE ISSUED ENJOINING APPELLANTS FROM SELLING THEIR CROPS DURING THAT TIME TO THE CENTRAL EUREKA.

This specification covers several of the assignments of error set forth, and enables us to present to the court a short review of the facts as we contend they are shown by the pleadings, opinion of the court and statement of the facts in the nature of a special verdict.

We well appreciate the rulings of this honorable court, which have been many times affirmed, to the effect that on appeals from territorial courts, in which undoubtedly this

Porto Rican appeal would be classified, the court in its review is limited in its jurisdiction to the ascertaining as to whether or not the findings and record as presented support the judgment of the court. See—

Neslin *vs.* Wells Fargo Company, 104 U. S., 428.
Harrick *vs.* Hannaman, 168 U. S., 328.
Naeglin *vs.* De Cordova, 171 U. S., 638.
Apache County *vs.* Barth, 177 U. S., 538.
Haws *vs.* Victoria Copper Co., 160 U. S., 303.

But it is well settled likewise that when a case is properly appealed to this court the court will go beyond the question upon which the jurisdiction of the appeal itself is based, and will dispose of the entire controversy, including all questions, whether of jurisdiction or on the merits.

Chappell *vs.* United States, 16 U. S., 499.
Homer *vs.* United States, 143 U. S., 570.
Santa Clara County *vs.* The Southern Pac. Railroad Co., 118 U. S., 394.

And in connection with this assignment of error and our review of the facts, as we contend they are established by the record, including the findings of the court, we shall maintain and contend that the decision of the court is not in anywise supported, either by the pleadings or the findings of the court, and that, therefore, even with the extremely restricted jurisdiction which prevails under the ruling of the court with reference to review on appeal from territorial courts, that this case should be reversed for the reasons so urged.

Certain fundamental facts are established by the pleadings.

That appellee was engaged in the operation of a sugar central in purchasing sugar-cane to be ground therein.

That appellants were engaged in raising sugar-cane on the premises described in the bill of complaint at a point about ten miles from the mill of appellee, and that on December

10, 1906, the grinding contract, made Exhibit "A" to the bill of complaint, was executed.

That one Swift had for several years prior to said time been attempting to negotiate contracts with planters and to secure the funds necessary to erect a mill to be known as "Eureka" in the said vicinity, but that in the latter part of the year 1906 the said Swift enterprise wholly failed and had been abandoned.

This fact of the failure and abandonment of the Swift enterprise prior to the execution of the grinding contract of December 10, 1906, is most important, as will develop, and on the face of the pleadings it is fully conceded and established.

Paragraph VII of the bill of complaint says:

> "That during the latter part of the year of our Lord one thousand nine hundred and six, the said proposed central, which was in all of the prospectuses of the said Swift called by the name of Central 'Eureka,' and was so designated in his correspondence with prospective colonos, etc., failed, for the reason that the said Swift failed to make satisfactory arrangement with his prospective colonos and failed to raise the necessary financial means to carry out his project."

And in paragraph XII of the bill of complaint, as follows:

> "Your orator further alleges unto your honor that Mateo and Luis Fajardo are the owners of a mill that is now abandoned and called 'San José,' situate near the station of Hormigueros, along the line of the American Railroad Company of Porto Rico, and that after the hereinbefore scheme of said Swift had wholly failed, and after the said Javierre and Gil had entered into the contract," etc.

And the final failure and cancellation of the Swift enterprise, as fully set forth and affirmed in paragraph VII of

the answer of appellants, being folio 29 of the transcript of the record, as follows:

> "And for answer to the seventh paragraph of the said bill of complaint, these defendants allege that they admit that during the years 1904 and 1905, and during a part of 1906, a certain person named Swift was negotiating for the erection of a sugar factory on one of the properties controlled by these defendants, or elsewhere in the vicinity, and they admit that in the latter part of the year 1906 and the negotiations of the said Swift and between the said Swift and the cane-planters in said District, with whom he was negotiating, including these defendants, failed and were definitely cancelled and abandoned. They admit that the said Swift wholly failed to make any satisfactory arrangements with the cane-planters of said District with whom he was negotiating, and failed to raise the necessary financial means to carry out the said project; and these defendants allege that in the month of September, 1906, the said Swift having wholly failed as aforesaid in his negotiations aforesaid for the establishment of the proposed sugar-mill to be erected by him, that all negotiations between the said sugar-cane planters, including these defendants and the said Swift, were definitely abandoned and cancelled, and that from that time, to-wit, the said month of September, 1906, all attempted renewals of negotiations by said Swift or anybody representing him in connection with the proposed construction of said sugar-mill, have been refused, and that since the month of September, 1906, and prior thereto, they have been engaged separately and independently negotiating with other parties for the construction of a sugar-mill or central, to be known as the Central Eureka, for the purpose of grinding the sugar-canes to be raised in said vicinity by these defendants and neighboring sugar-planters."

And the final cancellation of all negotiations between appellants and the said Swift enterprise is directly found by

the court in the findings of fact at folio 86 of the transcript of the record, where the court says:

> "That on the 21st of September (1906) the said Cabasa, together with Clemente Javierre, one of the copartners of the respondent copartnership, sent a further cablegram to the said Swift in London, declaring that all negotiations with the said Swift were at an end and that they had found other parties who were able to make the required deposit or guarantee."

We therefore assume that there was no issue presented by the pleadings in the case as to the failure and abandonment of the Swift enterprise in the latter part of 1906, and we also assume and maintain, and make the same a part of our contention, that the judgment of the court is not in consonance with the findings of fact, in so far as the court finds that the said Swift enterprise had not been abandoned, and that, in fact, the said Swift was still negotiating and making efforts to secure contracts with planters during a portion of the year 1907.

We maintain that such findings on the part of the court find no warrant in the pleadings, and on the contrary are expressly excluded from any consideration by reason of the issues presented by the pleadings, and that, therefore, so far as such findings may be considered material in the support of the decision of the court, they are erroneous and must be rejected.

Starting then with the fact definitely alleged in both the complaint and answer, that the Swift enterprise was abandoned and was therefore eliminated from the situation in the latter part of the year 1906, we come to the meeting of planters held at the home of one of the appellants on October 20, 1906, at which the following agreement was executed by appellants, represented by Clemente Javierre and other planters (Transcript of Record, folios 86 and 87):

"Having met at Hacienda Dos Hermanos on the 20th of October, 1906, upon invitation from Don Antonio R. Cabasa y Tasara, to confer about the installation of Central Eureka, in view of the delay and it being almost sure that Mr. A. E. H. Swift, with whom Mr. Cabasa had a contract for installing said central, has not been able to accomplish it, a meeting was held by Messrs. Clemente Javierre, for Javierre and Gil, Mateo Fajardo, Luis Fajardo and Mr. Cabasa, who having heard the reasons set forth by Mr. Cabasa, all agreed as to the necessity of installing said central, and in order to accomplish such beneficial and necessary project they all agreed to carry same into effect, purchasing the establishments and the surrounding lands from Messrs. Fajardo for the erection thereon of said Central Eureka, under the following conditions:

"1. To organize a company for that purpose as soon as Messrs. Matias Gil and D. L. Thompson would arrive, they being absent.

"2. The corporation to be denominated 'Central Eureka' and the factory to be installed in the establishments of Messrs. Fajardo, hereinbefore mentioned, which shall be purchased at the price agreed upon by the incorporators.

"3. The incorporators bind themselves to sell their canes to this central during ten years, commencing from the one of 1908, as regards Javierre and Gil, Cabassa and Luis Fajardo, and after the expiration or cancellation of his contract with Guanica Central as to Mr. Mateo Fajardo.

"And for safety and record for all concerned a copy is issued to each of the interested parties who sign below.

(Signed) "CLEMENTE JAVIERRE.
"A. R. CABASA.
"M. FAJARDO.
"L. FAJARDO."

This meeting was followed by preparations, plans, and estimates for the proposed mill during November, 1906, which seems to have been all that was done prior to Decem-

ber 10 of that year, when the contract in controversy was executed.

The clause of said contract upon the meaning and intention, and construction of which this controversy rests, is that numbered XIV, as amended by the parties, and which reads as follows (Transcript of record, folio 17):

> "The duration of this contract will be five crops, beginning with that of 1906-1907, it being understood, however, that should the projected central 'Eureka' be constructed or in course of construction on the 15th of January, 1908 (1908), the party of the second part will have the right to cancel this contract, giving notice thereof to the party of the first part on October 1st, 1907, *Addition.* The party of the first part binds itself to place at Hormigueros station sufficient cars, on each working day, in order that the party of the second part may load about one hundred tons of cane daily, save cases of force majeur (fuerza mayor)."

It will be borne in mind that appellants at said time were under no obligation or promise of any kind to the said Swift enterprise.

The court distinctly finds, at folio 86, as hereinbefore set out, that the said appellants had, in September, cabled to London, severing all relations with the said Swift, so that from the pleadings and findings of fact the only obligation resting upon appellants at the time of the execution of the grinding contract of December 10, 1906, was that created by the agreement of the planters of October 20, aforesaid, by which they agreed to sell their canes to the new Eureka mill which they were proposing to themselves erect, and which, as shown by the record and findings of fact of the court, they did actually subsequently erect. (Transcript of record, folio 89.)

Much of the matter contained in the findings of fact relates to the alleged subsequent attempts on the part of Swift to continue or to reopen negotiations with various planters,

but as we contend that such findings of fact are directly in conflict with the pleadings, we maintain that they are entirely immaterial, and, in addition, there is no word or intimation in the findings which directly or indirectly connect appellants with any such alleged further negotiations, and it is expressly found by the court that appellants did not participate in the alleged meeting in connection with such efforts of said Swift, which is referred to in the fifteenth finding of fact in the record.

We are then, upon the pleadings and findings of fact presented, with the following situation on December 10, 1906. In making the contract it was specifically provided:

> "That should the projected Central 'Eureka' be constructed or in course of construction on the 15th day of January, 1908, the party of the second part shall have the right to cancel the present contract, giving notice thereof to the party of the first part on the 1st of October, 1907."

It is conceded that the Central Eureka, which was originated at the meeting of October 20, 1906, and in every step of which appellants participated, was either erected or in process of erection at the time indicated, and that the notice of cancellation, as required by said clause, was duly served. (Transcript of record, folio 97.)

We maintain that upon the record as presented and finding of facts a decree for the appellee, complainant below, was utterly inconsistent; that the decree is at variance with the facts as found by the court, and which must constitute the basis of its ultimate action.

The court does not pretend to find which Central Eureka was actually intended by the parties in making the contract of December 10, 1906, but the fact of a decree for complainant below, appellee here, necessarily assumes that the Swift project was the one referred to in the said grinding contract. This conclusion is not supported by the facts as declared by the court, but, on the contrary, we contend the only possible

logical conclusion from the statement of facts would be that the Central Eureka referred to was that in which appellants were at that time actually interested, and to which they had contracted on October 20, 1906, to furnish their sugar-canes for the period of ten years.

It has been consistently held that in case of such a variance between the findings and the decree that the court would reverse the judgment and render such judgment as would support the findings of the court below.

> "Deference to a chancellor's findings of fact will only be given on appeal on balanced or conflicting evidence, and when that appears to be correct."
>
> Glasgow Milling Co. *vs.* Burns, 144 Mo., 192.
> McElroy *vs.* Maxwell, 100 Mo., 308.
> Mandain *vs.* Fullenwider, 72 Neb., 221.

> "On appeal from an equitable action the judgment will be reversed if essential special findings are in conflict with a general finding, and the former are sufficiently supported by the evidence."
>
> Carpenter Paper Co. *vs.* The News Publishing Co., 63 Neb., 59.

> "Findings of fact must affirmatively support the judgment."
>
> Maynard *vs.* Locomotive Engineers Ins. Co., 14 Utah, 458.
> Karren *vs.* Karren, 25 Utah, 87.
> Kinsey *vs.* Green, 51 California, 379.

II.

THE COURT ERRED IN DECLARING THAT THE BURDEN OF SHOWING THAT THE CENTRAL EUREKA REFERRED TO IN PARAGRAPH XIV OF THE CONTRACT OF DECEMBER 10, 1906, WAS NOT THE PROJECT KNOWN AS THE SWIFT EUREKA CENTRAL WAS ON THE DEFENDANTS, AND THE COURT ERRED IN HOLDING THAT THE BURDEN OF PROOF AS TO THE IDENTITY OF THE PROJECTED CENTRAL EUREKA REFERRED TO IN SAID AMENDED PARAGRAPH XIV OF THE GRINDING CONTRACT OF DECEMBER 10, 1906, WAS ON THE DEFENDANTS.

This will cover several of the assignments of error which may be grouped and discussed together, as they constitute really a single branch of the controversy.

The court below in its opinion and findings expressly placed the burden of proof as to the identity of the projected Central Eureka referred to in paragraph XIV of the grinding contract, as amended, upon the defendants.

In the last paragraph of the opinion of the court (Transcript of record, folio 65) it is said:

> "As stated, we feel that the burden is on the respondents as to the real issue in the case, and we find that they have not by a preponderance of the evidence established their right to have given this notice to complainant on October 1, 1907, and to end the contract."

Also, the same ruling is made at folio 50 of the opinion of the court, and in the findings of fact numbered 9 and 13, at folios 96 and 98 of the record, the court emphasized this ruling in the following language:

> "The court further finds from the evidence that the respondent copartnership has not proven by a preponderance of the evidence that the projected Eureka Central mentioned in clause XIV, as amended, of the contract of December 10, 1906, re-

ferred to the projected enterprise which was initiated at the alleged meeting on October 20, 1906, of the said sugar-cane planters, and the said respondent co-partnership has not shown by a preponderance of the evidence that the projected Central Eureka mentioned in the said paragraph XIV of said contract of December 10, 1906, was not the project known as the Swift Eureka, in which enterprise the said respondents had been interested, as hereinbefore determined.

* * * * * * *

"And the court finds that the alleged proposal to erect a Central Eureka by the said planters, including the said respondents Javierre & Gil, was not generally known at said time; that the burden of proof in this cause as to the identity of the projected Central Eureka referred to in the said amended paragraph XIV, of said contract of December 10, 1906, was on the respondents, and that the said respondents did not maintain or prove by a preponderance of the testimony that the said projected Central Eureka referred to in the said clause of said contract was not the said projected central of Swift, or that the same was the projected central which has since been erected by the said planters, including the said respondents, under the said name of Eureka."

And the failure of defendants to produce such preponderance of the evidence is directly stated by the court to be the controlling reason for the decision in favor of appellee.

A brief analysis of the situation presented by the pleadings would seem to clearly demonstrate the absolute error of the court in this ruling.

This is a suit for an injunction, seeking to prevent defendants from carrying out a threatened violation of a contract.

In the bill of complaint the contract is set forth and declared upon, and it is alleged that the proposed Eureka Central referred to in clause XIV of the contract is the said Swift enterprise and no other. It is also charged in paragraph XII of the bill of complaint (folios 7 and 8, Tran-

script of record) that the defendants, appellants, entered into a conspiracy and combination with certain other people therein named to create a new Central Eureka for the sole and only purpose of enabling appellants to claim that the same was the identical Central Eureka referred to in said paragraph XIV, and to thus enable them to fraudulently and wrongfully rescind the contract of December 10, 1906, and the charge of fraudulent combination and conspiracy constitutes the basis of the prayer for relief.

It must be borne in mind that this bill of complaint was filed more than three months prior to the time (October 1, 1907) when appellants could, under the contract, take any steps or give any notice of their election to cancel the contract under the provisions of said paragraph XIV.

The answer fully denies all allegations of fraudulent combination or conspiracy, and denies with equal positiveness that the Central Eureka, referred to in the said paragraph XIV of the contract, was the so-called Swift Eureka Central, but alleges that the central so referred to was that having its origin in the meeting on October 20, 1906, and in which defendants (appellants) were participants and large stockholders.

We inquire, was there, or is there now, any presumption that the Central Eureka referred to was the Swift project any more than that it referred to the Fajardo project of October 20, 1906?

A decision of the court to the effect that appellants must show by a preponderance of the evidence that the Swift project was not the proposed Central Eureka referred to, or, as stated by the court at another point, that appellants must show by a preponderance of the evidence that the Eureka Central referred to in said contract was the project in which they were interested, would indeed provide a new rule of evidence and one which our search of the authorities has not yet disclosed, either in text-book or decision.

The universal rule that the burden of proof of a fact is

upon him who asserts it is sufficient of itself to cover the necessities of this case.

Complainants allege, and to recover must prove, that defendants entered into a combination or conspiracy to enable them to violate a contract; that this violation was to be committed by pretending that a certain proposed sugar-mill known by the name of "Eureka" was not, in fact, the Eureka project which the complainants alleged it to be, and, in order to make proof to justify a decree in favor of complainant, it must prove by a preponderance of the testimony, in view of defendants' denial, that the [illegible]ft Eureka was the project actually intended and referred to in the said contract.

> "He who avers a fact as a cause of action or defense must maintain his allegation by the greater weight of the evidence."
>
> Mutual Reserve Fund Life Assurance Co. *vs.* Powell, 79 Ill. Appeals, 364.
>
> Piper *vs.* Watkins, 8 Kansas Appeals, 215.

> "The burden of sustaining the affirmative of an issue does not shift during the progress of a trial, but it is for the party alleging the facts constituting the issue, and remains there until the end."
>
> Rupp *vs.* Sarpy County, 71 Neb., 382.
> Vertrees *vs.* Gage County, 75 Neb., 332.
> Simmonton *vs.* Winter, 5 Peters, 141.
> Adams *vs.* Adams, 21 Wallace, 185.
> Knox *vs.* Smith, 4 Howard, 298.
> Lewis *vs.* Cocks, 23 Wallace, 470.

And there is no rule better established than that which declares that fraud and conspiracy, when alleged as the basis of an action, must be clearly proven in order to warrant a recovery.

Farrar *vs.* Churchill, 135 U. S., 609.
Gaines *vs.* Nicholson, 9 Howard, 356.
United States *vs.* Da Maza Arredondo, 6 Peters, 691.
Jones *vs.* Simpson, 116 U. S., 609.
Jacobs *vs.* Van Sickel, 123 Fed., 341.

The learned judge below, in his opinion, in attempting to justify his ruling placing the burden of proof in this case on the defendants, and as set forth at folio 50 of the transcript of the record, cites several cases, assuming to find a similarity between the facts in the present case and those upon which the cases so cited were founded, and wherein it had been held that the burden of proof in those actions devolved upon the defendants; but we maintain that an examination of these authorities clearly shows that they are far from being in support of the position for which the learned judge was contending, but rather that they favor the contention which we now present. Certainly in no one of the cases cited by the court below were the facts either analogous or in anywise based upon a situation similar to the one presented in this present controversy.

The decision in the case of Cheesman *vs.* Hart, 42 Fed., 105, quoted by the court as supporting said ruling, is an announcement of the doctrine maintained by all of the Federal courts, in the so-called apex and side-line controversies in the mining laws, and under which it has been universally held that the burden belongs upon the defendant, and, under the circumstances as disclosed by the issue in those cases, there would seem to be no contention as to the correctness of that ruling; but the situation thus presented is so utterly foreign to that presented in the present controversy as to make them entirely valueless as authorities in this controversy.

It might be interesting, however, in this same connection to invite the attention of the court to the fact that in the opinion of Judge Phillips, in the case reported in the 42d Federal, just referred to, and relied upon by the learned judge below in support of his decision of this point, that Judge Phillips emphatically determined that, inasmuch as the burden of proof devolved upon the defendants in that case, that the defendants should have the opening and close in the controversy, and we remark, in passing, and the record will bear us out, that it never was pretended or assumed

that in this controversy the defendants were entitled to the opening and closing, or to any advantage in connection with the trial which might result from the fact of the burden of proof being shifted upon them.

III.

THE ERROR OF THE COURT IN HOLDING THAT THIS CASE PRESENTED, IN ANY EVENT, ANY GROUND FOR EQUITABLE RELIEF, AND IN THE ISSUANCE OF AN INJUNCTION IN THE PREMISES. THE ONLY CONSISTENT RELIEF WHICH COULD BE APPLIED FOR WOULD BE IN THE NATURE OF SPECIFIC PERFORMANCE.

In presenting this assignment of error, we maintain that the bill of complaint in this action did not present any recognized ground for equitable relief.

It was conceded on the trial that, under the circumstances disclosed by the bill of complaint, specific performance would not lie.

A similar case was that of Grape Creek Coal Company *vs.* Spellman, 39 Ill. Appeals, where the court decided:

> "Chancery will not entertain a bill to specifically enforce a contract to sell to complainant all of the output of defendant's coal mine, it being a contract relating to personal property and calling for a succession of acts whose performance cannot be consummated by one transaction, and which requires protracted supervision and direction."

As stated, and the record shows, the court did find that specific performance would not lie, but upheld the contention of complainant's counsel that the negative remedy of injunction to prevent a breach of contract could be made effective. This negative remedy by injunction to prevent a breach of contract, though one of the well-established forms of equitable relief, is only granted in certain well-defined classes

of cases, to which this suit is in no way analogous, and it can only be invoked when the facts stated from their nature show that specific performance would be impracticable.

In the argument in the court below, counsel for appellee urged that the case would fall within the purview of those decisions well known and fully conceded in which courts have declined to render a decree for the performance of contracts involving personal services, such as the performing of musicians, the acting of actors, or other cases in which, owing to their peculiar characteristics, the enforcement of performance would be practically impossible, and in this contention the court below coincided. (Transcript of record, folio 48.) But in no way do either the principle or reasoning of those cases enter into the facts stated herein. Here is a plain and simple contract, that for a prescribed period of time appellants will deliver to appellee all sugar-canes which they may raise upon certain premises therein described. If they should abandon the raising of any sugar-cane during said time they are at entire liberty to do so and no damages could be claimed against them; but, if they do raise any cane on said premises during said time, it must be sold and delivered to appellants under said contract. Under such circumstances it is hard to conceive how it would be possible for equity to intervene to grant any form of relief. The granting of an injunction, as was done in this case, to prevent the defendants from selling their sugar-canes to some other sugar-mill could in nowise benefit the complainant. If it could not have the benefit of a decree for specific performance, and thus avoid the irreparable injury threatened, which must form the basis of this action, what possible good would be a decree prohibiting the sale of such sugar-canes to any other mill? And why should equity intervene? Why would not an action at law for damages be equally, or even more, effective for complainant? And, in this connection, we invite the attention of the court to the fact that there was not in the complaint any allegation of insolvency on the part of defendant.

IV.

THE COURT ERRED IN GRANTING ANY RELIEF TO APPELLEE, BECAUSE THE CONTRACT WAS WHOLLY UNILATERAL AND INCAPABLE OF ENFORCEMENT BY A COURT OF EQUITY, EITHER BY WAY OF SPECIFIC PERFORMANCE OR BY INJUNCTION.

This assignment involves an investigation of the contract of December 10, 1906, which is set forth at folios 13 to 17 of the transcript of the record.

We have here presented in seventeen paragraphs the printed form which, according to the transcript of the record in this case, was regularly used by this sugar company for its business and which the planter is called upon to execute in order to find a sale for the product of his labor, and we invite the attention of the court to a brief review of its provisions with the object of ascertaining whether it is sufficiently mutual in its provisions or requirements as to justify the intervention of a court of equity in decreeing either its enforcement or in granting any relief as against a planter who refuses to abide by its harsh provisions.

By the provisions of paragraph I it is provided that the canes to be raised on certain premises shall be ground at the factory of appellee.

By paragraph II the condition of the cane and the manner of cutting and delivery are provided for.

By paragraph III the manner of payment of expenses of cutting and delivery are provided for.

By paragraph IV the manner of weighing the cane is fixed.

By paragraph V the condition of the cane and time to commence cutting is fixed, and it is put at the discretion of the mill.

By paragraph VI a penalty is provided in favor of the mill in case the planter should violate certain of its provisions.

By paragraph VII the grinding season is fixed.

By paragraph VIII the planter must notify the mill how much cane he will deliver during any month of the crop.

By paragraph IX the price to be paid for the cane is fixed.

By paragraph X the time for making payment for canes delivered is fixed.

By paragraph XI it is provided that in any case of breakage of machinery, or mill, or railroad, cutting and delivery of cane shall immediately stop, on notice, and that after a certain time the planter may sell his cane to some other mill until such time as such breakage shall be repaired, when delivery under the contract shall be at once resumed.

By paragraph XII it is provided that, in case of fire in the field, the burned cane shall be first ground, but at prices to be agreed upon.

By paragraph XIII it is provided that if the canes delivered are not up to a degree of sugar prescribed the mill may refuse to receive them.

By paragraph XIV the duration of the contract is fixed, and it will be noticed, in this connection, that under this section the mill is given an option to extend the terms of the contract for five years without corresponding option upon the part of the planter.

By paragraph XV the planter is prohibited from selling, donating, renting, leasing, or mortgaging his property, or establishing any lien or encumbrance on it or its products during the life of the contract, except on condition that the contract shall be fully respected, and under this same paragraph the mill is authorized to sell, assign, or transfer the contract in its discretion.

Paragraph XVI is a palpable joke; it provides that if any money shall be loaned by the mill to the planter a special contract, in a separate document, shall be made for it.

Paragraph XVII provides that the mill may station a man at the loading station to determine that the canes offered for shipping are satisfactory to the mill.

This is the contract, and it might be pertinent to inquire

where are the paragraphs which provide anything for the protection of the planter or his rights?

It certainly is one of the most unjust and unilateral contracts ever presented to a court for consideration.

The only possible theory that we can conceive upon which a court, either of equity or law, would be justified in attempting either to hold a planter to the performance of such a contract, or to award damages for its violation, would be in a case where, in order to justify the construction of a mill and the expenditure of the money necessary therefor, it would be necessary that contracts for periods of time should be made with planters; but that element of reasoning cannot possibly enter into this case, because, as clearly appears from the record in this case, the mill of appellee was constructed and in full operation during the grinding season of 1905, and the investments in connection therewith were in nowise dependent upon nor had any relation to the grinding contract with appellants executed in December, 1906, and for canes growing, as shown by the record, at least ten miles from the location of the mill. (Transcript of record, folio 2.)

It cannot be contended that appellee's mill was either constructed or enlarged upon any consideration moving from this contract. Therefore we come again to the matter of the contract itself to ascertain whether it contains such mutual and enforceable provisions as will bring it within the protection of the benevolence of a court of equity, or whether it is a simple promise, having no real consideration, and therefore subject to be ignored by either party.

If it may be enforced against the unfortunate planter, then, under all rules and principles of equity, it must be enforceable against the mill; but it is apparent that this is not so. Under this contract the mill can so arrange its affairs as to dictate when, where, and how it will receive the canes, and their condition; it can effectively terminate the contract, if it shall see fit to do so, or may, on its own motion, arbitrarily extend it for five years. The price it pays may

be a good one for one year and a bad one for the next, and nowhere throughout the entire contract does there appear to be any consideration for the planter for thus burdening his future and his property.

It cannot be urged that appellants were in anywise dependent upon appellee for a market for their sugar-canes, for they were dealing with other mills before appellee's factory was started, and the bill of complaint shows that there are more mills in the vicinity than the supply of sugar-cane would justify.

"The remedy must be mutual."
Ross *vs.* U. P. R. R. Co., Fed. Cases, 12080.
Pullman Par. Car Co. *vs.* Texas & Pac. R. R. Co., 11 Fed., 625.

"Where a contract is harsh the court will leave the parties to their remedy at law."
King *vs.* Hamilton, 29 U. S., 311.
Redman *vs.* Zilley, 1 N. J. Equity, 320.
Appeal of Weise, 72 Pa., 351.

"Even though the contract be valid at law, if it be harsh or unjust, equity will not relieve."
Leigh *vs.* Crump, 36 N. C., 299.
Freind *vs.* Lamb, 152 Pa., 529.

Upon the whole of the record and proceedings in this case counsel for appellants thereupon respectfully submit these their contentions, and pray for the reversal and setting aside of the judgment and decree of the court below.

Respectfully submitted,

CHARLES HARTZELL and
M. RODRIGUEZ SERRA,
Solicitors for Appellants.

JAVIERRE *v.* CENTRAL ALTAGRACIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 171. Argued April 26, 1910.—Decided May 16, 1910.

Where a proviso carves an exception, dependent on a condition subsequent, out of the body of a statute or contract, the party setting up the exception must prove, and has the burden, that the condition subsequent has actually come to pass.

A contract for delivery for a term of years, of sugar, terminable meanwhile only in case a specified new Central was built, could not, in this case, be terminated unless the particular Central contemplated was built; it was not enough that a Central called by the same name had been built.

Damages in a suit at law for failure to comply with the terms of a contract for delivery of crops is an adequate remedy and specific performance and an injunction against delivery to others should have been refused in this case.

THE facts are stated in the opinion.

Mr. Charles Hartzell, with whom *Mr. Manuel Rodriguez Serra* was on the brief, for appellants:

The burden of showing that the Central Eureka referred to in the contract was not the project known as the Swift Eureka Central was not on the defendants below but such burden as to the identity of the projected Central Eureka referred to was on the plaintiffs below.

There was not, nor is there now, any presumption that the Central Eureka referred to was the Swift project. The burden of proof of a fact is upon him who asserts it. Complainants

(defendants in error here) allege, and to recover must prove, that defendants entered into a combination or conspiracy to enable them to violate a contract; that this violation was to be committed by pretending that a certain proposed sugar mill known by the name of "Eureka" was not, in fact, the Eureka project which the complainants alleged it to be, and in order to make proof to justify a decree in its favor it must prove by a preponderance of the testimony, in view of defendants' denial, that the Swift Eureka was the project actually intended and referred to in the said contract. *Mutual Reserve Fund* v. *Powell*, 79 Ill. App. 364; *Piper* v. *Watkins*, 8 Kan. App. 215; *Rupp* v. *Sarpy County*, 71 Nebraska, 382; *Vertrees* v. *Gage County*, 75 Nebraska, 332; *Simonton* v. *Winter*, 5 Pet. 141; *Adams* v. *Adams*, 21 Wall. 185; *Knox* v. *Smith*, 4 How. 298; *Lewis* v. *Cocks*, 23 Wall. 470.

Fraud and conspiracy, when alleged as the basis of action, must be clearly proven in order to warrant a recovery. *Farrar* v. *Churchill*, 135 U. S. 609; *Gaines* v. *Nicholson*, 9 How. 356; *United States* v. *Arredondo*, 6 Pet. 691; *Jones* v. *Simpson*, 116 U. S. 609; *Jacobs* v. *Van Sickel*, 123 Fed. Rep. 341; *Cheesman* v. *Hart*, 42 Fed. Rep. 98, distinguished.

This case does not present in any event, any ground for equitable relief, or the issuance of an injunction. The only consistent relief which could be applied for would be in the nature of specific performance. *Grape Creek Company* v. *Spellman*, 39 Ill. App. 630.

Equity should not intervene. An action at law for damages is equally, or even more, effective for complainant. There is no allegation in the complaint of defendants' insolvency.

The court erred in granting any relief to appellee, because the contract was wholly unilateral and incapable of enforcement by a court of equity, either by way of specific performance or by injunction.

Appellee's mill was neither constructed nor enlarged upon any consideration moving from this contract. There was no consideration.

Appellants were not in anywise dependent upon appellee for a market for their sugar cane, for they were dealing with other mills before appellee's factory was started, and the bill of complaint shows that there are more mills in the vicinity than the supply of sugar cane would justify. The remedy must be mutual. *Ross* v. *U. P. R. R. Co.*, Fed. Cas. 12,080; *Pullman Pal. Car Co.* v. *Texas & Pac. R. R. Co.*, 11 Fed. Rep. 625.

Where a contract is harsh the court will leave the parties to their remedy at law. *King* v. *Hamilton*, 4 Pet. 311; *Redman* v. *Zilley*, 1 N. J. Eq. 320; *Appeal of Weise*, 72 Pa. St. 351. Even though the contract be valid at law, if it be harsh or unjust, equity will not relieve. *Leigh* v. *Crump*, 36 N. C. 299; *Friend* v. *Lamb*, 152 Pa. St. 529.

Mr. Hugo Kohlman, with whom *Mr. F. L. Cornwell* and *Mr. N. B. K. Pettingill* were on the brief, for appellee:

Relief was properly given by injunction instead of by specific performance.

The bill of complaint prayed for an injunction and not for specific performance. Defendants in a suit cannot complain that only partial relief has been granted. The bill is not strictly to decree a performance of a contract, but, by injunction, to prevent the destruction of contractual obligations. *Hendricks* v. *Hughes*, 117 Alabama, 591.

This doctrine seems to be an extension of that maintaining the right to enjoin the violation of contracts for personal services so well established and often applied since *Lumley* v. *Wagner*, 1 De G., M. & G. 604.

The fundamental basis of jurisdiction to enjoin the violation of the contract instead of leaving a complainant to his action at law for damages is the impracticability of ascertaining with any definiteness the real extent of such damage; hence the inadequacy of the remedy. Where performance is to continue through a series of years in the future, that fact alone renders definite ascertainment of damages impossible. See the following English cases more or less analogous in their

reasoning to the case at bar: *Jones* v. *North*, 44 L. J. Ch. 388; *Donnell* v. *Bennett*, 22 Ch. Div. 835; *Whitwood Chem. Co.* v. *Hardman*, L. R. [1891] 2 Ch. 416; *Catt* v. *Tourle*, L. R. 4 App. Ch. 654; and also see the following American cases: *W. U. Tel. Co.* v. *U. P. Ry. Co.*, 3 Fed. Rep. 423, 429; *C. & A. Ry. Co.* v. *N. Y., L. E. & W. R. R. Co.*, 24 Fed. Rep. 516, 521; *Alpers* v. *City of San Francisco*, 32 Fed. Rep. 503; *General Elec. Co.* v. *Westinghouse Co.*, 151 Fed. Rep. 664, 672, 677; *Manhattan &c.* v. *N. J. &c.*, 23 N. J. Eq. 161; *St. Regis Co.* v. *Lumber Co.*, 173 N. Y. 149, 161.

The same principles have been applied in cases involving contracts wherein public interests were involved. *Walla Walla* v. *Water Co.*, 172 U. S. 1, 11; *Joy* v. *St. Louis*, 138 U. S. 1, 46.

Defense of appellants upon question of meaning of disputed clause of contract is affirmative. The burden of proof under such a proviso is clear. *United States* v. *Cook*, 17 Wall. 168, 176; and see *Steel* v. *Smith*, 1 B. & A. 99, in which a proviso, exactly as in the case at bar, was construed.

In equity where an answer which is put in issue admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved. *Clements* v. *Moore*, 6 Wall. 299, 315; and see to the same effect, *Bour* v. *Kimball*, 40 Ill. App. 327; *Nelson* v. *United States*, 30 Fed. Rep. 116; *Lake Shore Co.* v. *Felton*, 43 C. C. A. 189, 193; *Miller* v. *Shields*, 124 Indiana, 170; *Rowell* v. *Janvrin*, 151 N. Y. 60, 67.

Even had the proviso allowing the cancellation of the contract been absolute, and self-operative in its terms, thus importing a condition, it would still have been a condition subsequent, of which the burden of proof would still be upon the party to be relieved by its fulfillment. *Den* v. *Steelman*, 10 N. J. L. 193, 204; *Hotham* v. *East India Co.*, 1 Term Rep. 638, 645.

The unilateral character of the contract is not open for consideration in this court, but even could the court consider that question, the mutuality of consideration and obligation is plainly apparent on its face.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree enjoining the appellants from delivering sugar cane grown on the haciendas Florentina and Estero to the Central Eureka for the term of five crops, beginning with the crop of the year 1906–7, or so long within that term as the appellee is ready to grind and pay for the same; and also from 'selling, donating, renting or mortgaging said haciendas' without stipulating for the carrying out of a contract made with the appellee. The contract referred to bound the appellants to have the cane grown on the two haciendas ground at the sugar factory of the appellee for the term just stated, at a certain price, with mutual agreements not necessary to set forth, but, so far as appears, fair and made upon equal terms. It was subject to a proviso, however, that if on January 15, 1908, the projected Eureka Central should have been erected or should be in course of construction, the appellants might cancel the contract, giving notice on October 1, 1907. The notice was given, but the appellee contended that the Eureka Central referred to was abandoned and that the Central relied upon as the ground for the notice was one got up by the appellants and named Eureka with a view to getting out of their contract with the appellee.

The findings of fact are not entirely satisfactory upon the point in issue. They set out evidence and avoid a conclusion more definite than that which we shall state. It appears, however, that for some years one Swift had been negotiating for the construction of a Central Eureka, and was continuing his efforts on December 10, 1906, when the contract was made. But in October 1906, Javierre had telegraphed to him that negotiations with him were at an end, and there was evidence that Javierre and others had met and made an agreement on October 20 to form a corporation to set up the 'said Central,' to be called the Central Eureka, 'it being almost sure' that Swift had failed. The parties were to sell their cane to this

Central for ten years. The court studiously avoids finding that this agreement was made, but does find that if Javierre signed it he did not consider himself bound by it, and, as has been seen, the contract with the appellee was of later date. The court also finds that it was not generally known that the planters had held the alleged meeting or were contemplating the erection of the Central, and, after stating other details, finds that the appellants have not proved, by a preponderance of evidence, that the contract referred to the Central Eureka started by them, or that the Central Eureka mentioned was other than the one projected by Swift. It ruled that the burden of proof was on the appellants, and thereupon made the decree.

There is some preliminary argument that the finding concerning the continuance of Swift's efforts is not warranted by the pleadings. If this were true, no objection seems to have been made in the court below, where no doubt an amendment would have been allowed if necessary. But it is a mistake. The bill merely alleges that Swift's arrangement failed 'during the latter part' of 1906, and qualifies even this by the further allegation that in the beginning of December Javierre stated to the officers of the complainant (appellee) that he was still bound to Swift, but that the thing had failed, and that he was disposed to make a contract with them if he could have a clause providing for the case of Swift's success. The only real questions concern the ruling on the burden of proof and the propriety of the relief in such a case as this.

As to the burden of proof, if that really in any way determined the result, the ruling was correct. The appellants were seeking to escape from the contract made by them on the ground of a condition subsequent embodied in a proviso. It was for them to show that the facts of the condition had come to pass. It is said that the bill alleges affirmatively a conspiracy to evade the undertaking, but that is merely by way of replication to the answer setting up the condition, and is nothing but a specific mode of denying that the condition had

been fulfilled. An allegation of fact that is material only as an indirect negative of something to be proved by the other party does not shift the burden of proof. *Starratt* v. *Mullen*, 148 Massachusetts, 570. So there is nothing but the general question to be considered and that is answered by the statement of it and by repeated decisions of this court. When a proviso like this carves an exception out of the body of a statute or contract those who set up such exception must prove it. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 10. *Ryan* v. *Carter*, 93 U. S. 78. *United States* v. *Cook*, 17 Wall. 168. *United States* v. *Dickson*, 15 Pet. 141, 165. Therefore it was for the appellants to prove that the Central referred to by the contract had been built or started. It was not enough to prove that a Central had been built and called by the same name.

The doubt as to the relief granted below is more serious and in the opinion of the majority of the court must prevail. According to that opinion a suit for damages would have given adequate relief and therefore the appellee should have been confined to its remedy at law. Again, the court would not undertake to decree specific performance and to require and to supervise the raising of the crop and the grinding of the sugar for even the now remaining period of the decree. There is a certain anomaly in granting the half way relief of an injunction against disposing of the crops elsewhere when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree. There is too a want of mutuality in the remedy, whatever that objection may amount to, as it is hard to see how an injunction could have been granted against the appellee had the case been reversed. *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339. Notwithstanding these considerations I should have preferred to affirm the decree, but as my reasons have been stated to my brethren and have not prevailed it is unnecessary to repeat them now.

Decree reversed.